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IN THE

Supreme Court of the United States

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MICHAEL RODAK, JR.,

October Term, 1972

No. 72-459

GRACE SLOAN, as State Treasurer of the Commonwealth of Pennsylvania

and

JOSE DIAZ and ENILDA DIAZ, His Wife, WILLIAM ZIMMERSPITZ and NANCY ZIMMERSPITZ, His Wife, F. CARL KRETZMANN and KATHERYN L. KRETZMANN, His Wife, ARTHUR HARVEY and MURIEL HARVEY, His Wife, DANIEL F. X. POWELL and ANNA T. POWELL, His Wife, SETH W. WATSON, JR., and ANNE P. WATSON, His Wife,
Appellants

v.

ALTON J. LEMON, NEAL F. BRACKEN and BENJAMIN S. LOWENSTEIN, *Appellees*

October Term, 1972

No. 72-620

HENRY E. CROUTER, *Appellant*

v.

ALTON J. LEMON, NEAL F. BRACKEN and BENJAMIN S. LOWENSTEIN, *Appellees*

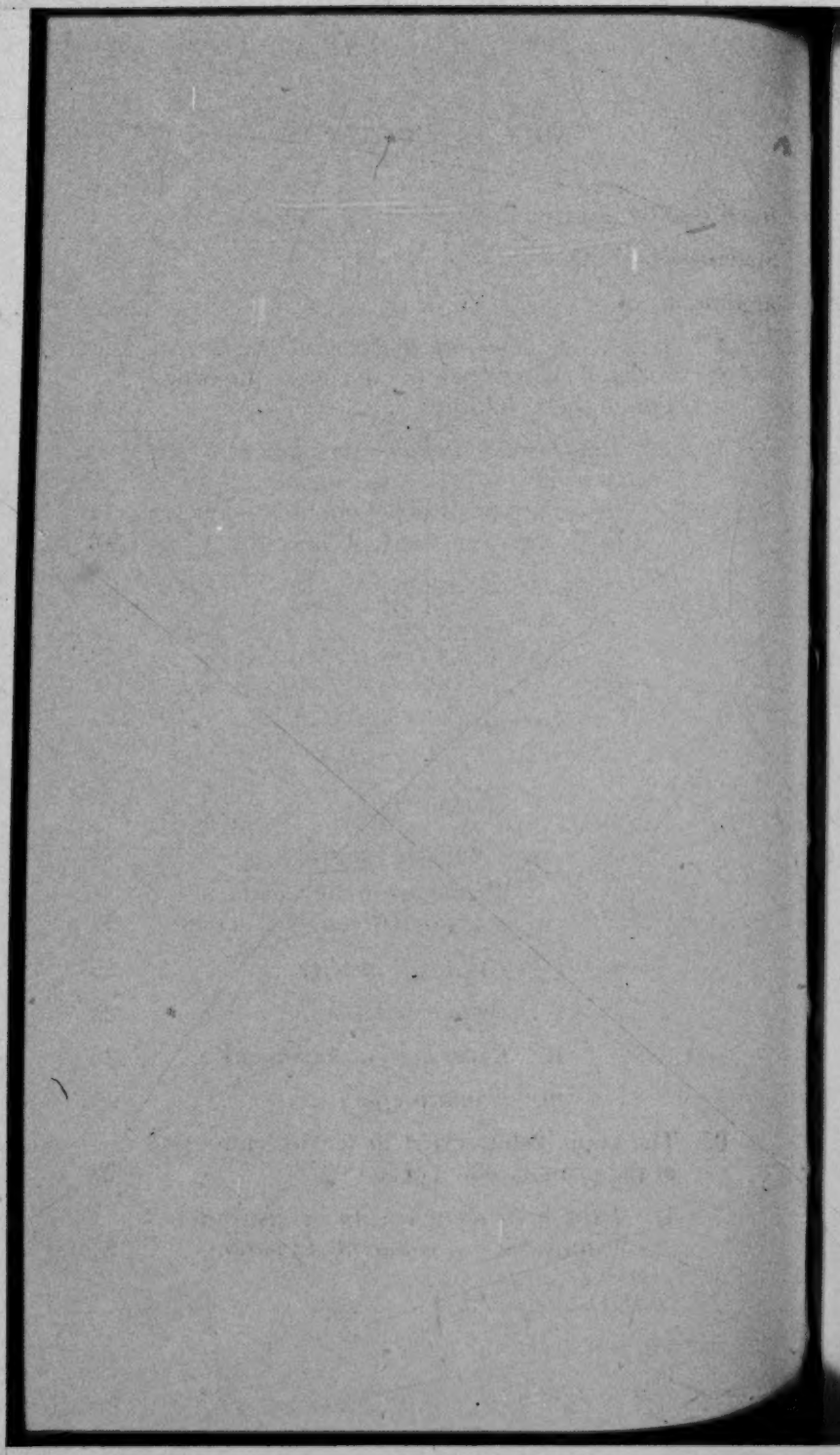
BRIEF FOR AMICUS CURIAE, CITY OF PHILADELPHIA

On Appeal from the United States District Court for the Eastern District of Pennsylvania.

JAMES L. J. PIÉ
Deputy City Solicitor
JOSEPH J. CARLIN
Deputy City Solicitor
THOMAS B. EREKSON
Law Department
MARTIN WEINBERG
City Solicitor
Attorneys for Amicus Curiae

1520 Municipal Services Bldg.
Philadelphia, Pennsylvania 19107

THE LEGAL INTELLIGENCER, 69 NORTH JUNIPER STREET, PHILA., PA. 19107



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INTEREST OF THE AMICUS

This brief is submitted on behalf of the City of Philadelphia, Commonwealth of Pennsylvania which has a population in excess of 1.9 million persons. Philadelphia has a public school population of 261,000 students, and a nonpublic school population of 142,000 students (54% of the public school population).[1] This brief is sponsored by City Solicitor Martin Weinberg, Esquire, the authorized law officer of Philadelphia.

This brief is submitted by your *amicus*, City of Philadelphia, in order to impress upon your Honorable Court the urgency and gravity of the adverse effects of the decision of the court below, on the City of Philadelphia, its nearly 2 million inhabitants, especially, and also on their fellow citizens in Pennsylvania and the nation. Philadelphia respectfully urges this Court to uphold the constitutionality of Act No. 92 of the General Assembly of the Commonwealth of Pennsylvania Act of August 27, 1971, P.L. —, 24 P.S., Sec. 5701, *et seq.*, known as the "Pennsylvania Parent Reimbursement Act for Nonpublic Education."

The act provides for partial reimbursement[2] of tuition paid by Pennsylvania parents for the education of their children in nonpublic schools. Approximately 35% of Philadelphia school children attend nonpublic schools.

On July 21, 1972, a three-judge constitutional court in the Eastern District of Pennsylvania, declared the Act unconstitutional and issued an Order perpetually enjoining disbursements to parents under the Act.[3]

Payments exceeding $10,000,000 have therefore been delayed to Philadelphia parents of nonpublic school children. Timely appeals have been filed on behalf of certain parents, parties below, and the Commonwealth of Pennsylvania.

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1. Attendance figures for school year ending June, 1972.
2. Up to $75 per child in elementary school; up to $150 in secondary school.
3. Lemon v. Sloan, 340 F. Supp. 1356 (E.D. Pa. 1972).

This Court, in an order dated January 22, 1973, noted probable jurisdiction.

The enormous financial and administrative burdens upon the taxpayers of Philadelphia, as well as the incalculable losses in terms of human rights and civil peace, are staggering.

Should all or any substantial number of parents, whose children now attend nonpublic schools, be forced to succumb to this increasingly heavy financial burden of supporting two educational systems, the results would be tragic for parents all over America, but especially those living in Philadelphia and other great urban centers. Some of the major consequences, if this Court fails to permit the implementation of Act 92, are as follows:

1. The "enormous added financial, educational and administrative burden" recognized by the Commonwealth in its legislative findings[4] falls most heavily upon the City of Philadelphia, the largest urban center in the state. As such, the City is forced to contend with the concentrated and interrelated problems which characterize urban centers throughout the nation at this point in history. Pointing out that nonpublic school attendance is largely an urban phenomenon, the Report of the President's Commission on School Finance[5] declared:

> "One of every 10 American children attends a nonpublic school; the proportion is much higher in urban areas where the nonpublic school is a much more significant part of American education than it is in the Nation as a whole. Roughly 83 percent of all nonpublic school children are found in what are known as Standard Metropolitan Statistical Areas

4. Act of General Assembly of Pennsylvania of August 27, 1971, No. 92, P.L. —, 24 P.S. Sec. 5702 set forth in 340 F.Supp. 1356, 1366.

5. *Schools, People, and Money, The Need for Educational Reform*, Final Report, PRESIDENT'S COMMISSION ON SCHOOL FINANCE, March 3, 1972, U.S.G.P.O. Stock No. 1780-0965, p. 54 [hereinafter cited as COMMISSIONS FINAL REPORT].

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(the cities and their suburbs), and nearly half (47.5 percent) of all nonpublic children attend schools in center cities. Of the total elementary and secondary school enrollment in our 10 largest cities, 24.6 percent is found in nonpublic schools.

"It is apparent that nonpublic education is largely an urban phenomenon. Inner city non-public schools—mainly Roman Catholic, but also Lutheran in many areas—provide a substantial part of the total investment in urban education. And where their existence is threatened by financial and other problems, our cities must confront the prospect of assuming the additional burdens of educating non-public children."

The prospect facing the City of Philadelphia at the present moment is grave. The transfer of the City's non-public school children to the public schools would create a 54% increase in the student population of the public schools. The corresponding increase, expressed in dollars at 199,765,872 in public school *operational* expenditures alone, would be a staggering blow to the City's taxpayers.[6] These additional expenditures have been estimated for the current fiscal year at $12 million if 10% of the students transfer, and at $153 million if all transfer. The latter figure is projected at $215 million for fiscal year 1974-75.[7]

6. The current operating budget for Philadelphia Public Schools is $369,936,800, a figure which has just been increased, as a result of a teachers' strike in an amount exceeding $98,000,000 over the next four years.

7. *See* REPORT OF THE ARCHDIOCESAN ADVISORY COMMITTEE, FINANCIAL CRISIS OF THE CATHOLIC SCHOOLS (1972). A nonsectarian committee composed of thirty leading citizens of the Philadelphia area, and representing business, labor, government, education and the community at large, published a voluminous report on the Financial Crisis of Catholic Schools in Philadelphia and Surrounding Counties. This report, popularly known as the "Gurash Report" after its Chairman, John T. Gurash, Board Chairman and Chief Executive Officer of the Insurance Company of North America, contains a vast amount of data concerning the financial crisis in Catholic

2. Massive transfers of students from nonpublic to public schools would create educational chaos. Even if the huge financial problem could be solved, the public schools, already struggling under the effort to educate a quarter of a million students, and, in the process, turning out far too many functional illiterates, would find it impossible to supply the facilities and the trained personnel to provide adequate education, within a reasonable time, to an additional 140,000 students. The inevitable effect will be substantial deterioration in the quality of education for all of the children of Philadelphia demanding a further investment of money and people of an incalculable amount.

3. A massive increase in taxes for educational purposes will produce extremely serious strains on the City's budget for all other municipal purposes. The City of Philadelphia, like the School District, both of whom must look to the same base of taxpayers living or doing business in Philadelphia for their financial means, already faces major deficits in each of its operating budgets. These deficits are the inevitable result of a diminishing tax base, which is itself due to the vicious circle of urban decay. Urban blight reduces the real estate tax base while at the same time necessitating rising tax rates in order to fight the

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Note 7—*Continued*

and public education today. The following figures indicate the estimated additional taxes which would be required to meet the additional operating costs* which would have to be met by the public schools of Philadelphia reflecting varying rates of transfer of substantial numbers of nonpublic school children to the public schools. The figures have been estimated for the current and succeeding two fiscal years; rates of student transfer are expressed as percentages of the existing Philadelphia nonpublic school population, and the amounts involved reflect millions of dollars.

Fiscal Year	10%	25%	50%	100%
1972-73	$12 million	30	60	153
1973-74	26 million	60	115	175
1974-75	46 million	98	176	215

*Capital expenditures constitute a huge addition to these sums. *See* 24 P.S. Sec. 5702(4).

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urban blight and the steady increase in crime arising therefrom, thus generating flight of industry and affluent taxpayers from Philadelphia and thereby reducing the tax base still further. These conditions, demanding steadily greater expenditures by the City, also make collection of the necessary funds more and more difficult because of diminishing realty values and loss of *in personam* jurisdiction over taxpayers. The action of the lower court, in striking down Act No. 92, a statute designed, *inter alia*, to prevent the addition of an "enormous burden" upon all the taxpayers, including those exercising educational freedom of choice, if not reversed, will contribute immensely to this vicious circle.

4. The forced transfer of large numbers of children from nonpublic to public schools will result in incalculable damage to the entire community in terms of human rights and the public peace.

(a) The creation of a monolithic public school system will further depreciate the quality of education by eliminating the only effective competition which serves as a spur to educational achievement.

(b) If student populations are swollen by the enforced addition of thousands of children whose parents believe in philosophical, theological and other ideological values differing substantially from those traditionally inculcated by the secular public schools, these public schools will be wracked with divisiveness by the efforts of each group to persuade or compel the school authorities to adopt educational policies consistent with each group's own deeply held values.

(c) The invalidation of Act No. 92 will strike down legislation designed to protect and encourage the constitutionally protected right of parents to choose the system of education they desire for their children. The precious right of parents to choose the system and teachers to whom they will entrust an important part of that education will be severely restricted so that only the rich will be able to exercise this invaluable civil right, all others being

forced to accept the state mandated educational philosophy offered by the state controlled schools. In Philadelphia, where, under difficult financial conditions, the parents of 140,000 children are still able to exercise this right, the loss of this freedom by so many of its citizens will be an incalculable loss of human rights to which this Court cannot be indifferent.

All of the results set forth above will have a serious harmful effect upon the entire community. For the purpose of this brief, however, your *amicus* will not dwell at length upon the massive economic effects, but will focus its attention upon the serious consequences with regard to human rights and the public peace set forth in paragraph 4, *supra*.

It is of grave note that Philadelphia, since this appeal, has been the scene of one of the most protracted strikes by public school teachers ever witnessed in this nation. The strike lasted ten weeks. The cost of settling the strike, in terms of labor costs alone, was $98,000,000, and the irreplaceable loss to the children and the psychological impact of the strike upon the community is incalculable. Leaders of organized labor throughout the City and across the nation rallied to the support of the teachers, going so far as to call for a city-wide general strike by all organized labor, which was averted at the last minute by the settlement of the teachers' strike. The 140,000 nonpublic school children were not directly affected by the strike, a fact which drastically reduced the impact of the strike upon the community.

Should a substantial number of the parents of nonpublic school children be compelled, by the increasing pressures of inflation aggravated by the spiraling increase in taxation, to withdraw their children from the nonpublic schools, and to transfer them to the entirely publicly supported public schools, the resulting impact upon the people of Philadelphia in terms of the loss of educational quality, drastically reduced freedom of educational choice, and steeply increased taxes will be unbearable.

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Therefore, your *amicus*, City of Philadelphia has a vital stake in the matter presently before this Court. This brief is submitted in an effort to convince this Court of the importance and the necessity for upholding the Act in question and thereby preserving the people of Philadelphia from the immense evils which will result in the future if the decision of the court below is not reversed.

STATEMENT OF THE QUESTION

Whether Pennsylvania may provide necessary financial assistance to protect the fundamental constitutional right of educational freedom of choice by parents for their children where economic pressures deprive parents of that freedom?

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ARGUMENT

A. The Act is designed to preserve the constitutional right of parents to choose the education of their children.

1. *Educational Freedom of choice in perspective*

The decision of this Court in this case will have much to do with whether or not freedom of choice in education will remain an economically feasible alternative for any but the very rich.

Just a half century ago, in 1922, a statute was enacted in Oregon, which, if it had been allowed to stand, would have destroyed every nonpublic school, created a monolithic public school system, and wiped out the parental right to choose the educators of their children. The act, by its terms, compelled all children to attend the public schools. This Court, in a unanimous opinion,[8] struck down that legislation and vindicated the profoundly important right of parents to control and direct the education of their children.

Fifty years later, in *Wisconsin v. Yoder*,[9] this Court again had reason to vindicate the "primary role of parents in the upbringing of their children," a matter which the Court declared, "is now established beyond debate as an enduring American tradition."[10]

Today, the right of parents to direct the religious education of their children is again under attack. This time, however, the threat comes not from a misguided legislature seeking to compel civil unity by coercive legislation, but rather from a well-meaning judiciary which, in its efforts to guard against possible dangers to the principle of church-state separation, has become insensitive to the compelling demands of educational freedom of choice.

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8. Pierce v. Society of Sisters, 268 U.S. 510 (1925).
9. — U.S. —, 32 L. Ed. 2d 15 (1972).
10. Id., at —, 32 L. Ed. 2d at 35.

The vital importance of the parental right has been well stated in *Pierce* and by Mr. Chief Justice Burger in *Yoder*:

". . . this case involves the fundamental interest of parents, as contrasted with that of the State, to guide the religious future and education of their children. The history and culture of western civilization reflect a strong tradition of parental concern for the nurture and upbringing of their children. This primary role of the parents in the upbringing of their children is now established beyond debate as an enduring American tradition. If not the first, perhaps the most significant statements of the Court in this area are found in *Pierce v. Society of Sisters*, in which the Court observed:

'Under the doctrine of *Meyer v. Nebraska*, 262 U.S. 390, (67 L Ed 1042, 43 S Ct 625, 29 ALR 1446), we think it entirely plain that the Act of 1922 unreasonably interferes with the liberty of parents and guardians to direct the upbringing and education of children under their control. As often heretofore pointed out, rights guaranteed by the Constitution may not be abridged by legislation which has no reasonable relation to some purpose within the competency of the State. The fundamental theory of liberty upon which all governments in this Union repose excludes any general power of the State to standardize its children by forcing them to accept instruction from public teachers only. The child is not the mere creature of the State; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations.' 268 US, at 534-535, 69 L Ed at 1078.

The duty to prepare the child for 'additional obligations,' referred to by the Court, must be read to include the inculcation of moral standards, religious beliefs and elements of good citizenship . . . the

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Court's holding in *Pierce* stands as a charter of the rights of parents to direct the religious upbringing of their children."[11]

This profoundly important right of parents to choose the educators of their children, can be violated, of course, not merely by coercive legislation such as that which was attempted in *Pierce*, but also by a combination of forces in the form of massive economic pressures, in part generated by the fiscal policies of government, itself (at all levels), coupled with a failure upon the part of government to take the necessary steps to prevent the destruction of those nonpublic institutions which provide the only alternative for the exercise of the parental right.

a) *The jeopardy of nonpublic schools*

That these institutions are in danger, indeed, rapidly decreasing in number, with the resulting diminution of the possibility of parental choice, has been made abundantly clear by President Richard Nixon in his report to the Congress on March 3, 1970, where he reported that, in the previous two years, close to a thousand nonpublic elementary and secondary schools had closed.[12] Subsequently, the President's Commission on School Finance, in its Final Report, pointed out the importance of nonpublic schools, in which one tenth of America's children are educated, and warned:

> "And where their existence is threatened by financial and other problems, our cities must confront the prospect of assuming the additional burdens of educating nonpublic children."[13]

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11. *Id.*

12. "Education Reform: The President's Message to the Congress Proposing a Series of Actions to improve Elementary and Secondary Education. March 3, 1970", *Weekly Compilation of Presidential Documents*, Vol. 6, No. 10, Monday, March 9, 1970, at p. 312.

13. *See* COMMISSION'S FINAL REPORT at 54.

The detriment to the public interest, which the Commission recognized as flowing from the loss of these schools is set forth in Chapter IX of the Final Report.

The attention of the Court is also directed to the report of Alan Pifer, president of the Carnegie Corporation of New York, entitled "The Jeopardy of Private Institutions,"[14] in which the author tells us that:

> ". . . a high proportion of our private educational, cultural, health, and welfare institutions are heading into deep trouble, increasingly affected by social and economic forces they are powerless to withstand. The steady, unrelenting deterioration of their position has now, for the first time, raised doubts about the continued viability of our traditional system of shared responsibility between public and private endeavor."[15]

b) *The importance of diversity*

Mr. Pifer made it very clear that, in his discussion of public and private institutions, he was not suggesting that possibly one or the other should be the exclusive vehicle in its field—a concept lacking "even a semblance of validity within this nation's experience." He then posed the following question:

> ". . . whether, in the aggregate, private institutions provide an essential element to the character of our national life [?]"[16]

Replying in the affirmative, the author sets forth four principal reasons why we should not permit these institutions to disappear: (1) they provide an opportunity for private effort for the public welfare; (2) their role in the "safe-guarding of academic, professional and artistic free-

14. Pifer, A., *The Jeopardy of Private Institutions*, reprinted from THE 1970 ANNUAL REPORT, CARNEGIE CORPORATION OF NEW YORK.

15. *Id.*, at 3.

16. *Id.*, at 5.

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dom" and protection of "liberty of mind and conscience"; (3) their role in providing services which government could not supply, particularly religious services; and (4) their contribution to our national life of "vital elements of diversity, free choice, and heterodoxy."[17] He then proposes various

17. *Id.*, More specifically, the author states:

"A fourth and perhaps most important reason private institutions must not be allowed to decline is that they bring to our national life vital elements of diversity, free choice, and heterodoxy. These qualities are often lumped together and their identity obscured in celebration of the vague and rather overworked concept of 'pluralism.' But each, in fact, has a quite different connotation, and each has its own special importance.

"Diversity suggests the existence of a variety of institutions within a given field, all rather different from one another in the way they are managed, in their perceptions of priorities, and in the kinds of service they offer. The term is value-free in that it contains no suggestion of superiority or inferiority. It says only that there are likely to be a number of ways to accomplish something and that in the long run the competition between several possible approaches is good for everybody. This prevents new ideas from being suppressed, it provides challenge to fat and complacent bureaucracies, it assures experimentation and flexibility, and it lends color to what might otherwise be a monochromatic scene.

"Free choice applies to the consumer rather than to the purveyor of services. It implies the existence of a market, wherein those seeking services can shop around and take their trade where they choose. The market is, of course, not an entirely free one because the costs of private services are likely to be higher than those provided by public institutions. But the existence of the market is, all the same, important to the way the consumer feels about his life, for he knows that if a massive public agency whose services he was using were to become rigid, or inhumane, he would at least have the possibility of an alternative.

"Heterodoxy describes the permitted presence in a society of unconventional ideas and philosophies and of institutions and organizations which nourish them. Tolerance of this kind is a sign of national maturity and self-confidence and indicates faith in the good sense of the average citizen to sort out what is genuine and what specious. It also recognizes that today's

remedies including "public subsidization of the consumers" (not the institutions), a form of aid having the advantage

> "that it reduces the likelihood of government control of the operations of private institutions and preserves the free market."[18]

This latter advantage is precisely the advantage which inheres in the parent reimbursement plan provided in Act 92. The Act eliminates governmental control (excessive entanglement) and it preserves the free market (parental choice). Therefore, by subsidizing the parent, rather than the school, the Act would preserve the values sought to be protected by *both* of the Religion Clauses in the First Amendment.

The importance of diversity to the American way has been well expressed by President Nixon in his message to the Congress on March 3, 1970, when he declared:

> ". . . The non-public elementary and secondary schools in the United States have long been an integral part of the nation's educational establishment—supplementing in an important way the main task of our

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Note 17—*Continued*

iconoclasm may, as the result of changing conditions, be tomorrow's orthodoxy and that any attempt forceably to stifle the free play of ideas, however seemingly eccentric, may produce stagnation or cause the build-up of powerful social forces that will eventually result in violent upheaval. Thus, the capacity to tolerate nonconformism, trying as this sometimes becomes, is the *sine qua non* of a free society. Without it, the imposition of a totalitarian state ultimately becomes inevitable.

"Private institutions are not the only contributors to pluralism. Public institutions can and do play a part in it; but their vulnerability in times of crisis places a special burden on private institutions for the preservation of diversity, of free choice, and of the capacity to tolerate heterodoxy—in short, for the preservation of an open society."

18. *Id.*, at 14.

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public school system. The nonpublic schools provide a diversity which our educational system would otherwise lack. They also give a spur of competition to the public schools—through which educational innovations come, both systems benefit, and progress results.

Should any single school system—public or private—ever acquire a complete monopoly over the education of our children, the absence of competition would neither be good for that school system nor good for the country. The non-public schools also give parents the opportunity to send their children to a school of their own choice, and of their own religious denomination. They offer a wider range of possibilities for education experimentation and special opportunities for minorities, especially Spanish-speaking Americans and black Americans. . . ."[19]

Similarly, the value of pluralism as a safeguard for civil rights was recognized by "The Federalist" two centuries ago:

"In a free government the security for civil rights must be the same as that for religious rights. It consists in the one case in the multiplicity of interests, and in the other in the multiplicity of sects."[20]

And see the prescient remarks of John Stuart Mill, in his classic essay "On Liberty,"[21] where, after discussing the "objections which are urged with reason against State education," he nevertheless urges that education be made compulsory, but warns against a State monopoly or near monopoly and of the importance of educational diversity.

"Were the duty of enforcing universal education once admitted, there would be an end to the difficul-

19. See note 12, *supra*.

20. *Cited in* W. DOUGLAS, FREEDOM OF THE MIND 11 (Doubleday & Co., Inc., Garden City: N.Y.) (1964).

21. J. S. MILL, ON LIBERTY 128-132 (World's Classics ed., Oxford University Press: London) (1940).

ties about what the State should teach, and how it should teach, which now convert the subject into a mere battle-field for sects and parties, causing the time and labour which should have been spent in educating, to be wasted in quarrelling about education. If the government would make up its mind to *require* for every child a good education, it might save itself the trouble of *providing* one. It might leave to parents to obtain the education where and how they pleased, and content itself with helping to pay the school fees of the poorer classes of children, and defraying the entire school expenses of those who have no one else to pay for them. *The objections which are urged with reason against State education, do not apply to the enforcement of education by the State, but to the State's taking upon itself to direct that education: which is a totally different thing. That the whole or any large part of the education of the people should be in State hands, I go as far as any one in deprecating. All that has been said of the importance of individuality of character, and diversity in opinions and modes of conduct, involves, as of the same unspeakable importance, diversity of education.* A general State education is a mere contrivance for moulding people to be exactly like one another: and as the mould in which it casts them is that which pleases the predominant power in the government, whether this be a monarch, a priesthood, an aristocracy, or the majority of the existing generation in proportion as it is efficient and successful, it establishes a despotism over the mind, leading by natural tendency to one over the body. An education established and controlled by the State should only exist, if it exist at all, as one among many competing experiments, carried on for the purpose of example and stimulus, to keep the others up to a certain standard of excellence. Unless, indeed, when society in general is in so backward a state that it could not or would not provide for itself any proper institutions of education,

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unless the government undertook the task: then, indeed, the government may, as the less of two great evils, take upon itself the business of schools and universities, as it may that of joint-stock companies, when private enterprise, in a shape fitted for undertaking great works of industry, does not exist in the country. But in general, if the country contains a sufficient number of persons qualified to provide education under government auspices, the same persons would be able and willing to give an equally good education on the voluntary principle, under the assurance of remuneration afforded by a law rendering education compulsory, combined with State aid to those unable to defray the expense."[22]

In America, more than a century later, we are slowly beginning to realize the wisdom of John Stuart Mill. Already the development which he deprecated has occurred as we see that a "large part of the education of the people" is in State hands. The people are beginning, however, to awaken to the danger of a state educational monopoly,[23]

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22. *Id.*, at 129-130 (Emphasis supplied except for single words).

23. *See, e.g., The Disadvantaged Poor: Education and Employment*, U.S. CHAMBER OF COMMERCE TASK FORCE ON ECONOMIC GROWTH AND OPPORTUNITY; U.S. Chamber of Commerce Catalogue No. 66-29037 (1966). This Report recommended government financial support for the education of all children, including support for private education as an alternative to public education. The Task Force based its recommendation upon the values of parental freedom of choice, the avoidance of governmental monopoly and the value of diversity and competition. Putting forth "the notion that government should not have a monopoly on publicy financed schooling", the Report said:

"Lack of competition eliminates (the) ceaseless pressure for progress. And, as a result, public schools are less vigorous than they could be.

"The second observation in support of our conclusion is based on the virtues of diversity. It is our conviction that no single collection of men, however competent and however

and legislatures are beginning to fashion ways and means[23] whereby the fast dwindling freedom of the people may be preserved.

It should be clearly understood that the City of Philadelphia is not proposing to dismantle the public schools. The danger is not in public schools, but in the monopoly, the lack of choice.[23] In fact the two large systems, public and nonpublic, in Philadelphia are in agreement concerning the necessity to work for the joint solution of their common problems and have formed a joint committee of the two school boards for this purpose. In a joint statement issued

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Note 23—*Continued*

dedicated, can exhaust the worthwhile possibilities in a given subject matter. Diverse groups, each pursuing institutional or personal self-interest or even selflessly working in a variety of intellectual climates, are more likely to produce divergent ideas than any monolith, no matter how tolerant. We take this diversity for granted in scholarship, in politics, and in the abundance and variety of the commercial marketplace. Why should we settle for the single choice in education?

"And finally, a strong bias in favor of free choice and maximum satisfaction of individual preferences underlies our conclusion. As an intrinsic matter, we think it desirable that parents should have a choice of schools for their children. Educational philosophies differ. Different schools, none of them perfect, will have different combinations of strengths and weaknesses. Parents—should be able to choose among them—Americans take their freedom for granted in planning college or university educations; relatively well-off Americans and members of some religious groups exercise the same choice for their children at the secondary-school level and sometimes before. Why should we settle for less for the great majority of Americans at the primary and secondary levels?" pp. 63 and 69.

23a. See Exhibit C in brief for appellant, Henry E. Crouter, at p. 60-61, showing programs in 32 states and the District of Columbia.

23b. For comments reflecting the role of public schools in a pluralist society see note 17, *supra*, last paragraph, and J. S. Mill's comment, *supra*, p. 16, recommending public schools as a "one among many competing experiments."

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by the two boards on November 24, 1969, they recognized their mutual dependence and agreed to work together to secure the public funds "necessary to provide essential educational services for all the children of Philadelphia."[24]

2. *Act 92 in perspective*

Act 92 of the Commonwealth of Pennsylvania represents one of the most recent legislative efforts to alleviate the potentially devastating financial burden on all of the taxpayers and to perpetuate parental freedom of choice in the education of their children.

Act 92 expressly sets forth the following legislative findings of fact:

> ". . . (3) In the exercise of their constitutional right to choose nonpublic education for their children, parents who support such education make a major contribution to the public welfare. However, the immense impact of inflation, plus sharply rising costs of education, now combine to place in jeopardy the ability of such parents fully to carry this burden.
>
> (4) Should parents of children now enrolled in nonpublic schools be forced by economic circumstances to transfer any substantial number of their children to public schools, an enormous added financial, educational and administrative burden would be placed upon the public schools and upon the taxpayers of the State. Without allowance for inflationary increase, the annual operating cost of educating in public schools, the five hundred thousand students now enrolled in Pennsylvania's nonpublic schools would be an additional four hundred million dollars ($400,000,000). Necessarily added capital costs to

24. Joint statement by Richardson Dilworth, President, Board (Philadelphia) of Education; William D. Valente, President, Archdiocesan Board of Education; Rt. Rev. Msgr. Edward T. Hughes, Superintendent, Archdiocesan Schools; Dr. Mark R. Shedd, Superintendent, Philadelphia Public Schools. November 24, 1969.

construct new facilities or acquire existing facilities would be in excess of one billion dollars ($1,000,000,000). Any substantial portion of these operating and capital costs would be an intolerable public burden and present standards of public education would be seriously jeopardized. Therefore, parents who maintain students in nonpublic schools provide a vital service to the Commonwealth."[25]

Act 92, the Pennsylvania Parent Reimbursement Act for Nonpublic Education, was enacted by the General Assembly and signed into law by the Governor, in 1971, as a direct response to the ruling of this Court in Lemon v. Kurtzman, 403 U.S. 602 (1971), invalidating a previous Act[26] of the Pennsylvania legislature. The legislative goals in each case were the same, but the method selected was fundamentally different. The goals were these: To secure the constitutionally protected right of parents to choose the educators of their children and, at the same time, to prevent the imposition of a massive burden upon the already overburdened public schools and the taxpayers who support them, by helping to prevent massive forced transfers of nonpublic school children. In this way, the law makers in each case sought to foster educational opportunity for all of the children in the Commonwealth.

The method selected, however, is, from a constitutional standpoint, fundamentally different. In the earlier Act, the law provided for the purchase of educational services, in the form of instruction in so-called "secular subjects", through contracts between the State Department of Education and the nonpublic schools. This Court, though agreeing that the goals were lawful, found that the method

25. 24 P.S. Sec. 5702(3) and (4) set forth in 340 F. Supp. 1356, at 1366.

26. Nonpublic Elementary and Secondary Education Act of 1968, June 19, Pa. Stat. Ann. Tit. 24 §5601 *et seq.* (Supp. 1969). The complete text of the statute appears in Appendix A to the opinion of the Court below, 310 F. Supp. 35, 55-58 (E.D. Pa. 1970). The Act is also known as Act 109.

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of contracting, with its concomitant system of regulations and controls designed to ensure the "secularity" of the instruction, constituted such an excessive entanglement of government and religious institutions that it could not survive the constitutional test.

Relying on this Court's decision in *Lemon v. Kurtzman*, the Pennsylvania legislature enacted the statute now before the Court. The new statute avoided the fatal "excessive entanglement" by subsidizing the parent, rather than the school, and by forbidding any State involvement between government and the schools. The new law, therefore, was carefully shaped to meet the requirements laid down by this Court. Your *amicus* believes that the lawmakers were successful in their effort to comply with the constitutional criteria spelled out by this Court, and was troubled when the local federal court declared the new Act to be in violation of the Establishment of Religion clause of the First Amendment of the United States Constitution.[27] We believe that the lower court was in error and, for the reasons set forth below, we urge this Court to reverse that decision and preserve the legislation here in question.

3. *Act 92 violates neither the policy underlying the Establishment Clause nor the constitutional criteria laid down by this Court.*

a. *Policy*

The Act successfully avoids "the three main evils against which the Establishment Clause was intended to afford protection: Sponsorship, financial support, and the active involvement of the sovereign in religious activity."[28]

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27. 340 F. Supp. 1356.

28. *See* Lemon v. Kurtzman, 403 U.S. 602, 612 (1971), (Burger, C.J.), *citing* Walz v. Tax Commission, 397 U.S. 664, 668 (1970).

i) "Sponsorship": Nothing in Act 92 can be construed as sponsoring any religion or religious institution. The benefits are available to all parents who choose to educate their children in schools other than public schools, without regard to whether the school chosen by the particular parent is church related, religiously oriented, sectarian or non-sectarian. If a parent chooses to send his child to a public school, his tuition is subsidized totally; if he chooses, pursuant to his constitutionally protected right[29], a nonpublic school, his tuition is subsidized, at least in part, by the tuition reimbursements provided under the Act. There is no sponsorship by the state of any religion or any school, religious or otherwise. The choice, the selection, of the particular institution to be patronized is left entirely to the free choice of the parent-citizen, and is in no way influenced by the state. That which is favored by the state is not a religion, not a school, but rather freedom—the freedom of the parent to choose the teachers of his children.

ii) "Financial support": There is nothing in Act 92 which would provide any financial support for religion or for any religious institution. What is supported, here, is the parent's civil right to exercise his freedom of choice in education. The basic error, which resulted in the decision of the court below to strike down this Act, was the failure to recognize the significance of this fundamental civil right. Instead, the court considered the parent to be a mere conduit[30] through which public funds would be channelled to religious institutions. This insensitivity to the rights of the parents and the implications of the Free Exercise Clause, coupled with an excessive preoccupation with the Establishment Clause, has produced the kind of rigidity which, in the words of Chief Justice Burger, "could well defeat the basic purpose" of the Religion Clauses:

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29. For a discussion of the vital matter of parents' rights to choose the educators to whom they will entrust the formal education of their children, *see* pp. 9-19 *supra*.

30. 340 F.Supp. at 1364.

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> "The course of constitutional neutrality in this area cannot be an absolutely straight line; rigidity could well defeat the basic purpose of these provisions, which is to insure that no religion be sponsored or favored, none commanded, and none inhibited. The general principle deducible from the First Amendment and all that has been said by the Court is this: that we will not tolerate either governmentally established religion or governmental interference with religion. Short of those expressly proscribed governmental acts there is room for play in the joints productive of a benevolent neutrality which will permit religious exercise to exist without sponsorship and without interference."[31]

Under Act 92, no religion is sponsored or favored, none is commanded, and none inhibited. The parent is left free to decide for himself whether he will choose public or nonpublic schools for his children. If he chooses the public school, he is subsidized by the public funds spent directly by the school authorities; if he chooses nonpublic schools, he is still subsidized, but by reimbursement for tuition costs. If there is any sponsorship here, any favoring of one choice over another, the favored choice is the public school, where the subsidy covers the full cost, rather than the nonpublic choice which results in only a partial subsidy, with the parent sustaining the balance of cost from his own pocket.

Further, in the event the parent selects a non-public school, the subsidy, the reimbursement of tuition, is not in any way affected by the circumstance that one parent might choose a sectarian school while another would choose a nonsectarian school; nor is there any difference in effect upon the parent's right to reimbursement if he chooses a Catholic school or a Jewish school. In every case, the right to reimbursement within the statutory limitations as to amount is the same. Furthermore, Act 92,

31. Walz v. Tax Commissioner, 397 U.S. 664, 669 (1970).

does not inhibit any religion or religion generally. Treating all parents of nonpublic school children alike, the Act does not tend to discourage any parent in the exercise of his freedom of choice by making one kind of nonpublic school less desirable than another. If there is any inhibition or discouragement here, it is to be found, not in the Act, which seeks to correct a long standing inequity, but rather in the action of the court below, which, by its rigid adherence to the Establishment concept and its insensitivity to the Free Exercise concept[32] has thrown a major inhibition in the path of parents bent upon the enjoyment of the constitutionally protected right of freedom of choice in education.

iii) Act 92 also avoids the third evil: "The active involvement of the sovereign in religious activity." Section 4 of the Act expressly forbids the Parent Assistance Authority, the agency charged with administering the funds, to exercise any control over any school.[33] The schools, of course, are subject to appropriate regulation and control in connection with those standards which the state has the right to impose, *Lemon*, (403 U.S. at 613), but all such controls are imposed by other state laws, not here in question. The absence of such involvement was recognized by the court below and by counsel for the plaintiff-appellees[34] and the court made no mention of entanglement in its opinion.

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32. *Cf.* Sherbert v. Verner, 374 U.S. 398, 413, 414 (1963) (Stewart, J., concurring).

33. Act 92, 24 P.S. Sec. 5704, states:

> "Pennsylvania Assistance Authority.—There is hereby created a body corporate and politic to be known as the Pennsylvania Parent Assistance Authority . . . The Authority shall have power to make and promulgate rules and regulations for the administration of this Act: Provided, however, that it shall exercise no direction, supervision or control over the policy determinations, personnel, curriculum, program of instruction or any other aspect of the administration or operation of any nonpublic school or schools."

34. Notes of Hearing, dated February 23, 1972, at page 65, where Mr. Mann said: "No, there is no administrative entanglement in this law."

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b. *Constitutional criteria*

Despite the fact that Act 92 was carefully designed to meet the constitutional tests laid down by this Court, the court below, as a result of a series of errors, declared the Act invalid and forbade any payments to parents under the law.

The court below restated[35] the three tests which this Court has developed for determining whether a particular program offends the Establishment Clause.

> "* * * First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion, Board of Education v. Allen, 392 U.S. 236, 243, 20 L.Ed.2d 1060, 1065, 88 S.Ct. 1923 (1968); finally, the statute must not foster 'an excessive government entanglement with religion.' Walz, *supra*, at 674, 25 L.Ed.2d at 704."[36]

i) *Secular purpose*

Applying the first test, the court below found that:

> "the stated legislative purpose of the Act is to aid parents to continue to send their children to nonpublic schools thereby fostering educational opportunities for both public and nonpublic school children."[37]

and concluded that

> "the Act expressed a legitimate secular objective consistent with the Establishment Clause."[38]

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35. 340 F.Supp. at 1360.

36. Lemon v. Kurtzman, 403 U.S. 602, 612-613 (1971), citing Board of Ed. v. Allen, 392 U.S. 236 (1968).

37. 340 F.Supp. at 1360.

38. Id. at 1360 (Citing *Allen, Lemon v. Kurtzman, and Tilton).* Tilton v. Richardson, 403 U.S. 672 (1971).

In reaching this conclusion the court discussed briefly the remarks of this Court in *Lemon v. Kurtzman*, where this Court declared:

> "Inquiry into the legislative purposes of the Pennsylvania and Rhode Island statutes affords no basis for a conclusion that the legislative intent was to advance religion. On the contrary, the statutes themselves clearly state that they are intended to enhance the quality of the secular education in all schools covered by the compulsory attendance laws. There is no reason to believe the legislature meant anything else. A State always has a legitimate concern for maintaining minimum standards in all schools it allows to operate. As in *Allen*, we find nothing here that undermines the stated legislative intent; it must therefore be afforded appropriate deference."[39]

ii) *Excessive entanglement*

In addition, the district court, without referring to the matter of "excessive government entanglement" in its opinion, recognized[40] that there was no such entanglement here.

iii) *Primary effect*

The decision of the court below, therefore, rested entirely upon its belief that the Act violated the second test, i.e., that its primary effect was to advance religion. The court erred in making this determination because:

(a) It failed to recognize the constitutional significance of the payment to parents;

(b) It failed to recognize that the primary effect of the legislation is aid to education by means de-

39. 403 U.S. at 613. Although both courts focused upon quality and minimum standards, there is implicit in the Act an additional secular legislative purpose; i.e., the support of parents' constitutionally protected freedom to choose the educators of their children. *See* discussion *infra*.

40. *See* note 34, supra.

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signed to secure the right of the person to the free exercise of religion;

B. The court below erred in its determination of the primary effect of Act 92.

1) *Failure to recognize the constitutional significance of payments to parents.*

a) *Parent, not school, is real beneficiary.*

An important feature of Act 92 is the fact that payment is to be made directly to the parent by way of reimbursement for tuition previously paid by him to a school. There is no payment by the State to the school. This fact is crucial and, indeed, the court below saw the problem in terms of whether or not "there is a constitutional difference between paying tuition to the school and reimbursing the parent for payments the parent has made to the school?"[41]

In its opinion, however, the lower court found that there was no constitutional difference, holding: (a) that the parent was a mere conduit through which the funds passed to the schools and, (b) even if this were not the case, the state has no power to aid *a parent* in providing religious education for his child. The following extract[42] from the opinion of the court below makes this quite clear:

> "However, we do not perceive any consitutional significance in the fact that payments are made in the form of reimbursement to the parents, a conduit plan or directly to the school. The economic consequences are the same for the church-related school whether it receives funds through a direct grant, a conduit plan or because the state increases family income through a reimbursement program which enables the parents to continue to pay tuition. In each case, tax-raised funds are being used to subsidize religious education.

41. Judge Hastie, in Notes of Hearing, dated February 23, 1972, at p. 15.

42. 340 F. Supp. at 1365.

"Finally, even if we held that the Act does not aid sectarian schools, we must still conclude that the act supports religion because it aids parents in providing a religious education for their children. It would seem indisputable that at least one, if not the main, purpose of a parent's sending his child to a religious school is to insure the early inculcation of religion. *See* Walz, *supra*, 397 U.S. at 671, 90 S.Ct. 1409, at 1412. Assuming equal secular educational standards as between public and religious schools, it is an almost inescapable sequitur that the statutory reimbursement is solely to enable the parents to augment the public school secular education with religious training. If parents cannot afford to provide religious education for their children in sectarian schools without state aid, then by providing a program for aiding the parents, the state is plainly advancing religious education. The state has no more power to subsidize parents in providing a religious education for their child than it has to subsidize church-related schools to do so. *See* Brusca v. State of Missouri ex rel. State Bd. of Ed., 332 F. Supp. 275 (E.D. Mo. 1971)."[43]

The court below, by erroneously deeming the parent to be a mere conduit, failed to recognize the distinction between persons and institutions which has often been recognized by this Court. Thus, in *Lemon v. Kurtzman*, this Court distinguished the earlier Pennsylvania purchase-of-service plan, with its method of providing aid "directly to the church-related school", from other cases in which the aid went "to the student and his parents". The Court stated:

"The Pennsylvania statute, moreover, has the further defect of providing state financial aid directly to the church-related school. This factor distinguishes both *Everson* and *Allen*, for in both those

43. *Id.*

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> cases the Court was careful to point out that state aid was provided to the student and his parents—not to the church-related school. [citation]. In *Walz* . . . the Court warned of the dangers of direct payments to religious organizations:
>
> " 'Obviously a direct money subsidy would be a relationship pregnant with involvement and, as with most governmental grant programs, could encompass sustained and detailed administrative relationships for enforcement of statutory or administrative standards . . .' "[44]

This language clearly shows that this Court has deemed the difference between grants to persons and direct payments to religious organizations a significant one. Further, its significance lies in the fact that direct payments create that excessive entanglement, that involvement, those administrative relationships, between government and religious institutions, which, when excessive, are forbidden by the Establishment Clause. The evil in direct grants is excessive entanglement, not the advancement or support of religion.

b) *The activity aided is neutral.*

The court below rejected this "reading of *Everson* and *Allen*"[45], insisting that it was not the fact that persons were the recipients, but rather that the aided activities (bus rides and secular text books) were "non-ideological or secular", which made the difference.

This is a possible approach to *Allen* and *Everson*, but it is certainly not borne out by the very plain language of this Court in *Lemon* and *Walz*, quoted above. In both *Allen* and *Everson*, the Court did speak of the fact that the activity aided was non-ideological and secular, but this is a questionable test, smacking of a religious test for the

44. 403 U.S. at 621.
45. 340 F. Supp. at 1363-64.

enjoyment of welfare benefits, and is inconsistent with the *Everson* language[46], reaffirmed in *Sherbert*, indicating that no one may be denied the benefits of public welfare legislation "because of their faith or lack of it." *See* note 55 *infra*. Furthermore, there are situations where government aid is provided directly to religious activity, *e.g.*, chapels on military installations; but, so long as the facilities are available to all on a non-preferential basis, there is no constitutional violation. The reason, of course, is because the real activity aided is the *free exercise* of religion; religion *as such* is aided only indirectly if, as and when, individual persons (and groups) proceed, by their own free acts, to use the premises for their own particular religious purposes.

Consequently, even if we assume, *arguendo*, that the lower court was correct in stating:

> ". . . that . . . the character of the aided activity rather than the manner in which aid is given . . . [determines] whether the state subsidy has the primary effect of advancing religion",[47]

we are brought back again to the fundamental question in this case—whether we are going to emphasize the Establishment Clause, and see the *school* with its *religion*, or, whether we are going to emphasize the Free Exercise Clause and see the *parent* with his *religious freedom*.

Those who take the first position will see an improper advancement of religion; those who take the second view will see a very proper encouragement of freedom. If the parent—and not the institution—is the true beneficiary,

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46. Apparently this is one of those instances, referred to by Mr. Chief Justice Burger in *Walz*, when he said: "The considerable internal inconsistency in the opinions of the Court derives from what, in retrospect, may have been too sweeping utterances on aspects of these [Religion] clauses that seemed clear in relation to the particular cases but have limited meaning as general principles." 397 U.S. at 669.

47. 340 F. Supp. at 1364.

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then the "character of the aided activity" *is* secular and non-ideological. The aided activity is not religion, but religious liberty. *Religious liberty is neither sectarian nor ideological; it is an activity which may most certainly be aided by the state.* Here, perhaps, is the very core of the problem facing this Court in this case. When the Court has been faced with close questions involving the clash of the two Religion Clauses, it has "struggled to find a neutral course between the two".[48] In all such cases it should be remembered that the policy of "benevolent neutrality" favors freedom; while an excessive emphasis upon non-Establishment produces "hostility".[49]

The ideal sought to be protected by the First Amendment is not the negative concept of non-establishment but rather the positive free exercise of religion. The *end* is freedom, the free exercise of religion; the *means*, which is intended to buttress that freedom, is the ban on establishment. Surely, when the application of the means does not serve the end, it is the end which should prevail.

The lower court, by emphasizing establishment rather than free exercise failed to perceive the basic issue in this case. By analyzing the statute with exclusive reference to "Establishment Clause" principles, and ignoring the far more crucial "Free Exercise" question, the court erroneously determined the test of constitutionality to be, not whether or not religious freedom is secured, but rather, whether or not tax funds are or may be used to subsidize religion. Having drawn the incorrect conclusion, the district court inevitably fell into the trap of that "brooding and pervasive devotion to the secular, and [that] passive or even active, hostility to the religious" against which Justices Harlan and Goldberg warned:

> "Untutored devotion to the concept of neutrality can lead to invocation or approval of results which partake not simply of that non-interference and non-

48. Walz v. Tax Commission, 397 U.S. 664, 668 (1970).
49. Zorach v. Clauson, 343 U.S. 306, 312-314 (1952).

involvement with the religious which the Constitution commands, but of a brooding and pervasive devotion to the secular and a passive, or even active, hostility to the religious. Such results are not only not compelled by the Constitution, but, it seems to me, are prohibited by it."[50]

In its failure to see the parent and his religious liberty, due to its preoccupation with the school and its religion, the court below lays itself open to the criticism expressed by Mr. Justice Stewart in the *Sherbert* case, ten years ago—the charge of insensitivity to religious liberty. Mr. Justice Stewart stated:

> "I am convinced that no liberty is more essential to the continued vitality of the free society which our Constitution guarantees than is the religious liberty protected by the Free Exercise Clause explicit in the First Amendment and imbedded in the Fourteenth. And I regret that on occasion, and specifically in Braunfeld v. Brown, 366 US 599, 6 L. Ed. 2nd 563, 81 S. Ct. 1144, supra, the Court has shown what has seemed to me a distressing insensitivity to the appropriate demands of this constitutional guarantee. By contrast I think that the Court's approach to the Establishment Clause has on occasion, and specifically in Engel, Schempp and Murray, been not only insensitive, but positively wooden, and that the Court has accorded to the Establishment Clause a meaning which neither the words, the history, nor the intention of the authors of that specific constitutional provision even remotely suggests."[51]

Contrary to the opinion of the lower court, the fact that the parent (and not the institution) is the recipient of the funds is crucial with respect to both of the Religion Clauses in the First Amendment.

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50. School District of Abington Township v. Schempp, 374 U.S. 203, 306 (1963) (Goldberg and Harlan, J.J., concurring).
51. 374 U.S. at 413-14.

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The Establishment Clause forbids state action which advances or inhibits religion; where the institution (religious) is the recipient of the funds there is a substantial risk that the government officials who administer the funds, by tendering or withholding funds and placing or ignoring restrictions on their use, will improperly influence the particular institution, favoring some and embarrassing others, and thus advancing or inhibiting religion. Although such improper activities are not inevitable, as evidenced by the numerous programs which have flourished over the years without complaint[52] the risk is there, at least in theory, and ought to be avoided if possible, at least as a matter of prudence, if not as a matter of law.

Where the administrators deal directly with the individual person, however, and are barred from any sort of control over the institution, as in the instant case,[53] the risk of interference or favoritism with respect to the institution is eliminated. The decision whether or not any funds shall go to any particular institution, sectarian or nonsectarian, is taken out of the hands of the public officials and placed in the hands of the individual parent-recipients. Thus, the opportunity to advance or favor any particular religion is denied the state officials, and left in the hands of the private person, where, of course, such decisions belong.

In the present matter, the court below failed to recognize this fundamental distinction: The Constitution requires *government* to be neutral; it does not require the individual citizen to be neutral.

By denying the distinction between individuals and institutions, deeming the former mere conduits to the latter, the lower court has imposed the necessity of neutrality

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52. *Cf.* The G.I. Bill under which war veterans were educated in schools of their choice at government expense; and provisions for education of Congressional and Supreme Court pages. In neither case is there any discrimination against religious schools.

53. Section 4 of the statute bars any regulation or control of schools by the Authority administering the Act.

(which properly applies to the state) upon individual persons to whom it cannot possibly apply. The *state* must be neutral but the *individual* is entitled to the free exercise of religion. To demand that he exercise his freedom only in a "neutral" fashion is to posit the absurd. But that is precisely what happens when the person is told that:

(a) he has a constitutionally protected right to choose the teachers of his children;

(b) the state will help him to exercise that right by financing the education of the children;

(c) the parent will be entitled to such assistance, however, only if he chooses a "neutral" school; and

(d) if he chooses a sectarian school, he will be denied the aid which otherwise is available to all parents.

When the state assists a person to exercise a constitutional right, the aided activity, i.e., the exercise of free choice, is not a sectarian matter. The state then is neutral. *How* and in what direction the person proceeds is his own affair and does not constitute state action.

c) *Denial of benefits for religious reasons is unlawful.*

This Court has often declared that the State may not inhibit the exercise of constitutionally protected freedoms by demanding their non-exercise as a condition of its favor or largesse. Thus, in *Sherbert*,[54] this Court rejected the idea that an applicant for unemployment compensation might be denied those benefits otherwise available to unemployed persons available for work because, as a Seventh Day Adventist, whose religious beliefs forbade her to work on Saturday, she had made herself "unavailable" by refusing to accept employment involving Saturday work. In the course of its opinion this Court expressed the following principles which appear to be highly relevant here:

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54. 374 U.S. 398.

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"It is too late in the day to doubt that the liberties of religion and expression may be infringed by the denial of or placing of conditions upon a benefit or privilege.[55] (Numerous cases and other authorities cited).

". . . conditions upon public benefits cannot be sustained if they so operate, whatever their purpose, as to inhibit or deter the exercise of First Amendment freedoms . . . The imposition of such a condition upon even a gratuitous benefit inevitably deter[s] or discourage[s] the exercise of First Amendment rights or expressions and thereby threaten to produce 'a result which the State could not command directly.' "[56]

In ordering that the unemployment benefits should be paid to the plaintiff, this Court denied that it was thereby fostering the "establishment" of her religion. The Court stated:

"In holding as we do, plainly we are not fostering the 'establishment' of the Seventh Day Adventist religion in South Carolina, for the extension of unemployment benefits to Sabbatarians in common with Sunday worshippers reflects nothing more than the government obligation of neutrality in the face of religious differences, and does not represent the involvement of religious with secular institutions which it is the object of the Establishment Clause to forestall". (Citing *Schempp*)[57]

and

"This holding but reaffirms a principle that we announced a decade and a half ago, namely that no State may 'exclude individual Catholics, Lutherans, Mohammedans, Baptists, Jews, Methodists, Nonbelievers, Presbyterians, or the members of any other

55. *Id.*, at 404.
56. *Id.*, at 405.
57. *Id.*, at 409.

> faith, *because of their faith, or lack of it*, from receiving the benefits of public welfare legislation. Everson v. Board of Education, 330 U.S. 1, 16."[58]

Contrary to prior holdings of this Court, the court below is insisting that parents who exercise their constitutionally protected right to direct the religious upbringing of their children by selecting a church-related school, must *therefore* be denied the welfare benefits in the form of tuition subsidies, which are made available in one form or another for all other parents in the Commonwealth.

As in *Sherbert*, so here, the payment to the person presents no "involvement of religion with secular institutions which it is the object of the Establishment Clause to forestall." As in *Sherbert*, so here, individual persons (parents) are inhibited and deterred in the exercise of their First Amendment freedom (the right to choose the school and thereby to direct the religious upbringing of their children) by the action of the court below in forbidding the payment of benefits which would otherwise be available to them. That action by the court plainly threatens to produce a result (the forced transfer of many children from nonpublic schools) which the State could not command directly. The decision of the court below, then, like the lower court decision in *Sherbert*, should be reversed.

d) *The state has power to assist parents in the exercise of their constitutional rights.*

Finally, as if recognizing the weakness of its treatment of the parent as a mere conduit, the court below held[59] that, even if the aid were admittedly directed to parents and not to schools, it would still be an improper support of religion. The district court stated:

> "Finally, the Act supports religion because it aids parents in providing a religious education for their children.

58. *Id.*, at 410 (Emphasis by the Court).
59. 340 F. Supp. at 1365.

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* * *

"The State has no more power to subsidize parents in providing a religious education for their child than it has to subsidize church-related schools to do so. *See* Brusca v. State of Missouri ex rel. State Bd. of Ed., 332 F. Supp. 275 (E.D. Mo. 1971)."[60]

Again the erroneous result is dictated by the court's inability to distinguish, constitutionally, between persons and institutions.

The Act, here, does not support religion, it supports religious *freedom*. Reimbursement for tuition payments assists the parent to carry the growing burden of meeting the high cost of education, a burden which jeopardizes his constitutional right to choose. The legislative findings in Act 92 declare:

"In the exercise of their constitutional right to choose non-public education for their children, parents who support such education make a major contribution to the public welfare. However, the immense impact of inflation, plus sharply rising costs of education, now combine to place in jeopardy the ability of such parents fully to carry this burden."[61]

Furthermore, we have been unable to find any decision of this Court which supports the lower court's finding that the "State has no power" under these circumstances. The only case cited by the court, *Brusca v. State of Missouri*,[62] is not authority for any such proposition. On the contrary, in *Brusca*, the issue was not whether the State had power to act, but only whether it was required to act. The *Brusca* court said:

"The issue presented by the amended complaint is not so much what Missouri *may* do but what it *must* do in aid of religious education.

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60. *Id.*

61. 24 P.S. §5702; 340 F. Supp. at 1366.

62. 332 F. Supp. 275. (E.D. Mo. 1971), *aff'd*, memorandum decision, — U.S. —, 92 S. Ct. 1493 (1972).

* * *

> All that is here involved is whether the enactment of some program designed to assist a parent in educating his child religiously with the use of tax-raised money is *mandated* by the First Amendment. On this narrow issue we hold that to the extent the Religion Clauses of the First Amendment to not prohibit such financial aid, they do not require that it be given by the State."[63]

On the basis of that case, and that case alone, the court below held that the State has no power to subsidize parents in providing a religious education for their children. There are no other cases cited by the court and, as a matter of fact, the issue is now before this Court for argument for the first time. Even if *Brusca* is correct, *i.e.*, there is no constitutional mandate requiring aid,[64] it does not follow that the State *may* not act.

It should be noted that the Constitution forbids laws "*prohibiting* the free exercise" of religion—*not* laws *protecting* that right. Indeed, the protection of the rights of citizens is the very reason for the existence of our government. In the words of the Declaration of Independence:

> "We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain inalienable Rights, that amongst these are Life, Liberty and the pursuit of Happiness. That to secure these rights, Governments are instituted among men . . ."[65]

This Court has declared that parental rights in education are a part of this fundamental liberty.

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63. *Id.* at 276 and 279. (Emphasis by the Court).

64. This matter need not be considered here because there is no demand for such a mandate. The Pennsylvania legislature has acted and the demand is on the part of the plaintiff-appellees to set aside the law.

65. Declaration of Independence, July 4, 1776. 1 Stat. 1.

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> "The fundamental theory of liberty upon which all governments in this Union repose excludes any general power in the State to standardize its children by forcing them to accept instruction from public teachers only."[66]

It follows, then, that government has the power to secure the rights of parents to choose nonpublic teachers for their children. Indeed, this Court recognized that such legislative action was a proper public purpose in the earlier *Lemon* case,[67] and, here also, the court below has accepted the expressed legislative purpose as valid.[68]

Although there are no decisions in which this Court has found that aid is mandatory, neither has it held that legislatures lack the power to take appropriate action to protect religious freedom. Indeed, Mr. Justice Stewart, concurring in *Sherbert*, has indicated that he believes the Free Exercise Clause "requires government to create an atmosphere of hospitality and accomodation to individual belief or disbelief", and that the "Constitution commands the positive protection by government of religious freedom."

> "I think the process of constitutional decision in the area of the relationships between government and religion demands considerably more than the invocation of broad-brushed rhetoric of the kind I have quoted. And I think that the gurantee of religious liberty embodied in the Free Exercise Clause affirmatively requires government to create an atmosphere of hospitality and accommodation to individual belief or disbelief. In short, I think our Constitution commands the positive protection by government of religious freedom—not only for a minority, however small

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66. Pierce v. Society of Sisters, 268 U.S. 510, 534-35 (1925). *See also* Wisconsin v. Yoder, — U.S. — 32 L. Ed. 2nd 15 (1972).

67. 403 U.S. at 613 (Act 109 was invalidated for other reasons).

68. 340 F. Supp. at 1360.

—not only for the majority, however large—but for each of us."[69]

Although Justices Harlan and White dissented in the same case, they did insist that States cannot be *compelled* (their emphasis) to make such accommodations and expressed the view that there is "enough flexibility in the Constitution to permit legislative judgment."

> "The constitutional obligation of 'neutrality,' (citing *Schempp*) is not so narrow a channel that the slightest deviation from an absolutely straight course leads to condemnation. There are too many instances in which no such course can be charted, too many areas in which the pervasive activities of the State justify some special provision for religion to prevent it from being submerged by an all-embracing secularism. The State violates its obligation of neutrality when, for example, it mandates a daily religious exercise in its public schools, with all the attendant pressures on the school children that such an exercise entails. (citing Engel and Schempp) But there is, I believe, enough flexibility in the Constitution to permit a legislative judgment accommodating an unemployment compensation law to the exercise of religious beliefs such as appellant's."[70]

It is submitted that there is enough flexibility in the Constitution to support the legislative judgment in the instant case. Pennsylvania, by subsidizing the consumer, has eliminated the "excessive entanglement" which invalidated its previous Act, and has effectively avoided any violation of either neutrality or free exercise. Act 92 should be upheld by this Court. Rigidity in discovering Establishment Clause barriers in every situation, no matter how far the legislators may have gone to meet the problem, can

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69. 374 U.S. at 415-16.
70. *Id.*, at 422-23.

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only result in the gradual extinction of nonpublic schools and, with them, the precious right of parents to choose the teachers of their children.

If the steady increase in the cost of education, and of educational and other taxes,[70a] coupled with a steady refusal by the courts to permit reasonable remedies, continues to force more and more parents to surrender their constitutionally protected right to see to the religious and spiritual upbringing of their children, then certainly the pervasive activities of the State will have submerged religion in an all embracing secularism.

In the opinion of your *amicus*, the plan devised by the Commonwealth of Pennsylvania, in order to foster educational opportunity for all children,[71] is a valid exercise of legislative power, and the reasons which moved the lower court to declare the plan invalid are erroneous. Your *amicus* therefore urges this Court to reverse the decision of the court below.

2) *The primary effect of Act 92 is not aid to religion, but aid to the free exercise thereof.*

a) *The myth of neutrality in education.*

Granted that government is required, under our Constitution, to be neutral with respect to the numerous, and often conflicting, views, opinions and beliefs, which flourish in our pluralistic society, the question is raised: How can government achieve the required neutrality in the area of aid to education?

It would seem that there are three theoretically possible courses open:

70a. Armstrong, "The Right Kind of Tax Reform," Fortune, December 1972, at p. 86; reporting Miller and Herriot, "Study of 1968 Income and Taxes," U.S. Census Bureau, where it appeared that the poorest people (under $2000/an.) pay the highest percentage of their income in property taxes, the principal source of school revenue in almost all states.

71. 24 P.S. §5702, 340 F. Supp. at 1356, 1366.

i) it can adopt a hands-off policy, offering no aid to education (public or private) at all, leaving the entire field to private initiative and private resources;

ii) it can decide to aid education only in such forms as are themselves neutral with respect to religion; or

iii) it can offer aid to all education without discrimination as between the religious flavors which distinguish the various kinds of education, *i.e.*, without preferring any one or more views over the others.

It is the position of your *amicus* that the first two options are impossible and that, consequently, given the admitted and well recognized right and power of government to further the education of its citizens, the only possible way in which this can be done without violating the constitutionally mandated neutrality is the third option—offering aid to all forms of education meeting adequate standards but without either granting or denying aid on the basis of religion.

i) *A hands-off policy is impossible.*

This proposition needs no lengthy explanation or proof. We are committed to the idea of universal education, and so long as we have not eliminated poverty and other major economic inequalities in our society, it is and will remain impossible for government to wash its hands of the responsibility for insuring that every person shall have an equal opportunity for education. The problem, then, is not *whether* government should concern itself with education, but rather, *how* it can express a proper concern without violating the fundamental rights of the person.

ii) *Aid restricted to neutral education is impossible.*

The idea that the financial aid which government may grant to education must be restricted to neutral education is impossible because there is no such thing as "neutral" education.

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That approach which is often referred to as "neutral" is, in fact, the so-called secular humanist or secularist approach, the principal tenet of which is the belief that so-called "religious" concepts, *i.e.*, concepts derived from belief in a personal deity, are irrelevant to the life of man on earth. Consequently, according to this belief, education, which is seen as preparation for life in the world, should eschew such concepts. Only that type of education, therefore, which ignores "religious" views is deemed to be neutral; while all others are deemed to be "sectarian". Of course other such negative views, such as an atheistic, agnostic or non-sectarian view are often accepted as "neutral".

The chief difficulty with this approach of "neutrality" is the fact that the "neutral" view is, itself, religious. The secular humanist is entitled, equally with the theist, to be protected in his free exercise of religion. His views are as important to him as are the views of an atheist or an agnostic, a deist, or any theist. By the same token, he has as little right as any of these to have his views established, *i.e.*, sponsored or favored, by any government which is subject to the Religious Clauses of the United States Constitution. The status of secular humanism as a religion has been recognized by this Court when it declared in *Torcaso v. Watkins*, 367 U.S. 488, 495, n. 11 (1961):

> "Among religions in this country which do not teach what would generally be considered a belief in the existence of God are Buddhism, Taoism, Ethical Culture, Secular Humanism and others."[72]

Now the secular humanist cannot reasonably have it both ways. He cannot insist that he is entitled to protection for the free exercise of his religion while, at the same

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72. *See also*, L. PFEFFER, CREEDS IN COMPETITION (1958). Mr. Pfeffer, counsel in *Torcaso* and the present case, stated: "In this study I shall regard humanism as a religion . . . This, I submit, is not an unreasonable inclusion. Ethical culture is exclusively humanist but is generally considered a religion." at 5.

time, claiming that his opinion may be adopted as a non-religion, a so-called "neutral" position and, therefore, not subject to the strictures of the Establishment Clause.[73] In an earlier and simpler day, this kind of ratiocination was known as having one's cake and eating it too.

The concept of so-called "neutral" education has been discussed by William D. Valente, of counsel to the Defendant-Appellants here and professor of law at Villanova University. Having observed that public education cannot be neutral any more than other schools, and that its religion is secular humanism, Professor Valente went on to point out the resistance which normally meets this concept:

> "Unfortunately many citizens who are committed to secularized education rejected these observations as unwarranted imputations of hostile intent. Nevertheless, we must be concerned with effects and not with good intentions. As stated by Professor Phenix in Columbia's Teachers College Record (October 1955, page 30):
>
> > 'It seems unfortunately to be the case that what has been presented as a means of preserving religious peace and freedom through secularization has to some extent become a method of

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73. *See* Freund, *Public Aid to Parochial Schools*. 82 HARV. L. REV. 1680 (1969) [hereinafter cited as *Freund*]. Professor Freund attempts to support precisely this two-faced "definition" arguing that: "This analysis is indeed useful, and indicates that the apparent discrepancy in definition is not unprincipled; but from the point of view of an idiosyncratic sect the sense of non-neutrality cannot but remain.", at 1686-87, n. 14. His analysis is most certainly useful as a self-serving declaration on behalf of the secularists, but many millions of his fellow Americans, idiosyncratic as they may be, will find the Professor's peculiar definition of neutrality as unacceptable as his totalitarian views concerning the undesirability of political debate and division in the matter of the religious guaranties. This matter of political divisiveness is treated elsewhere in this brief, see p.p. 59-69 *infra*, in connection with the discussion of *Wolman v. Essex*, 342 F. Supp. 399 (S.D. Ohio E.D. 1972); *aff'd* — U.S. —, 34 L. Ed. 2d 69 (1972).

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propagating a particular dogmatic faith, namely, scientific naturalism, or, to give it another name, naturalistic humanism.'

"Furthermore, the argument that non-theistic orientation makes education neutral ignores fundamental educational psychology. For many, such neutrality 'against' is a positive, though subtle indoctrination of the secularist viewpoint. Dr. Luther A. Weigle, formerly of Yale Divinity School, emphasized this point:

> 'The ignoring of religion in the schools inevitably conveys to the children a negative suggestion . . . It is natural for them to conclude that religion is negligible or unimportant, or irrelevant to the main business of life.'

"This is not a theologian's refinement. Sir Walter Moberly, prominent British educator, made the same observation:

> 'It is a fallacy to suppose that by omitting a subject you teach nothing about it. On the contrary you teach that it is to be omitted, and that it is therefore a matter of secondary importance. And you teach this not openly and explicitly, which would invite criticism; you simply take it for granted and thereby insinuate it silently, insidiously, and all but irresistibly.'

"Since one-third of the child's waking hours are spent in school, in a secularist atmosphere, where the urge to conform is considerable, and this pattern endures through so great a part of his growth, parents may legitimately deny the neutrality of the government school."[74]

It is, of course, just such considerations as these which lend weight to parents' concern for the right to choose the educators of their children, a right vindicated

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74. Valente, *Freedom in Education*, TORCH AND TRUMPET (Jan., 1964) [hereinafter cited as *Valente*].

by this Court nearly 50 years ago in *Pierce* and reiterated only last year in *Wisconsin v. Yoder*, — U.S. —, 92 S.Ct. 1526, 32 L.Ed.2d 15, 35 (1972), where this Court quoted the following "most significant statement" from *Pierce:*

> "Under the doctrine of *Meyer v. Nebraska*, 262 U.S. 390, we think it entirely plain that the Act of 1922 unreasonably interferes with the liberty of parents and guardians to direct the upbringing and education of children under their control. As often heretofore pointed out, rights guaranteed by the Constitution may not be abridged by legislation which has no reasonable relation to some purpose within the competency of the State. The fundamental theory of liberty upon which all governments in this Union repose excludes any general power of the States to standardize its children by forcing them to accept instruction from public teachers only. The child is not the mere creature of the State; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations? [citation of *Pierce*]"

This Court, in *Yoder*, continued:

> "The duty to prepare the child for 'additional obligations', referred to by the Court, must be read to include the inculcation of moral standards, religious beliefs and elements of good citizenship. * * *
>
> However read, the Court's holding in *Pierce* stands as a charter of the rights of parents to direct the religious upbringing of their children."[75]

The Court also recognized that the teachers in public schools may well be hostile to the religious faith of some citizens, so that exposure to such teachers may interpose a serious barrier to the integration of the child into his religious community.[75a]

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75. — U.S. —, 32 L. Ed. 2d 15, 35.

75a. *Id.*, at 22, 23.

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To point out the non-neutral nature of education in the public schools does not mean that those schools must be abolished. As Professor Valente stated:

> "Criticism of the alleged neutrality of the government school should not be taken as an attack on the institution itself. The government school has served well those who prefer man-centered education. It will always play a very large role in America. But, for the sake of truth and justice, we should set to rest the myth that the government school is or can honestly be neutral and serve the educational need of all citizens."[76]

The first two alternatives (a hands-off policy and a policy of aid limited to neutral forms of education) being impossible, we are left with the third alternative: aid to all forms of education without discrimination based on religion.

iii) *Only a policy of non-discriminatory sharing of tax funds without regard to religion is constitutionally sound.*

Only a doctrinaire theory of "absolute separation of church and state" would compel the conclusion that public schools, if they are not neutral, must be abolished. The only sound approach in keeping with the spirit of "benevolent neutrality" adopted by this Court (rather than the doctrinaire theory espoused by the plaintiff-appellees in this case) is that the public schools should be preserved so long as they meet the educational needs of many of our people. However, the monopoly of public funds heretofore enjoyed by public schools should be discontinued in favor of the third alternative, i.e., the sharing of educational tax funds by all legitimate[77] forms of education without

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76. *Valente, supra* note 74.

77. Legitimate forms are all schools which meet the minimum standards required by law. *See Allen* and *Pierce, passim.*

discrimination among the "religious" varieties which distinguish the different kinds of education.

Act 92, here under consideration, does precisely this, it makes available a portion of tax funds to enable parents to exercise their right to choose the teachers of their children. In this way, the Act is consistent with the truly neutral, non-discriminatory policy followed by the federal government in the various "G.I. Bills" under which hundreds of thousands of returning war veterans attended schools of their personal choice, at government expense, without discrimination with respect to the "religious" or "non-religious", "sectarian" or "non-sectarian", "public" or "nonpublic" nature of the school or schools attended. Those programs, as well as others used to educate congressional and Supreme Court pages at schools of their choice, are benevolently neutral, favoring the freedom of educational choice of every beneficiary while denying that freedom to none. The only objection that could be raised to such programs is that they fail to satisfy the extreme demands for "absolute separation" espoused by opponents of Act 92. This Court has long since rejected this extremist view, pointing out in *Walz:*

> "The Establishment and Free Exercise Clauses of the First Amendment are not the most precisely drawn portions of the Constitution. The sweep of the absolute prohibitions in the Religion Clauses may have been calculated; but the purpose was to state an objective, not to write a statute. In attempting to articulate the scope of the two Religion Clauses, the Court's opinions reflect the limitations inherent in formulating general principles on a case-by-case basis. The considerable internal inconsistency in the opinions of the Court derives from what, in retrospect, may have been two sweeping utterances on aspects of these clauses that seemed clear in relation to the particular cases but have limited meaning as general principles.
>
> "The Court has struggled to find a neutral course between the two Religion Clauses, both of which are

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cast in absolute terms, and either of which, if expanded to a logical extreme, would tend to clash with the other. For example, in Zorach v. Clauson, 343 US 306, 96 L Ed 954, 72 S Ct 679 (1952), Mr. Justice Douglas, writing for the Court, noted:

> 'The First Amendment, however, does not say that in every and all respects there shall be a separation of Church and State.' Id., at 312, 96 L Ed at 961.
>
> 'We sponsor an attitude on the part of government that shows no partiality to any one group and that lets each flourish according to the zeal of its adherents and the appeal of its dogma.' Id., at 313, 96 L Ed at 962.

"Mr. Justice Harlan expressed something of this in his dissent in *Sherbert v. Verner*. 374 US 398, 10 L Ed 2d 965, 83 S Ct 1790 (1963), saying that the constitutional neutrality imposed on us 'is not so narrow a channel that the slightest deviation from an absolutely straight course leads to condemnation.' Id., at 422, 10 L Ed 2d at 981."[78]

The "struggle" of the Court to find a neutral course has been made more difficult by the confusion attendant upon the efforts of proponents of an extreme "separation" theory to impose a requirement of neutrality not only upon government, where it is appropriate, but upon every activity which government touches, including education. But this is impossible. Rabbi Dudley Weinberg, discussing various church-state problems including proposals for a common core program for a course in religion in public schools, commented:

> "When we assume that such a religiously or denominationally neutral core curriculum can be developed, I believe that we overlook a subtle but important truth. We overlook the fact that a curricu-

78. 397 U.S. at 668-69.

lum is not simply made up of books. *In the last analysis, the teacher is the curriculum. A teacher can never be a detached neutral.* He can never withdraw from involvement both with the ideas and the material he presents and with the student who sits opposite him and who is, like himself, a living, outreaching, curious, reacting, hostile or accepting person. I believe that we commit a serious error if we assume that it is ever possible to subtract from the learning-teaching situation the reality that makes the teacher—with all of his own commitments, judgments, affirmations and negations—at least as much a part of the curriculum as is the textbook."[79]

It is submitted that the fact that a "teacher can never be a detached neutral" lies at the heart of the sacred right of parents to select the teachers of their children. This right, however, can become a meaningless phrase if the pervasive power of government, in its steady advance into ever-widening spheres in the life of the citizen, fails to take reasonable steps to preserve religious freedom.

Act 92 is just such a reasonable step. It encourages educational opportunity and educational freedom for all, while avoiding the entanglement of government and religion forbidden by the Establishment Clause and the encroachment upon parental freedom forbidden by the Free Exercise Clause, and it does this without advancing or inhibiting any religion. Act 92 should be sustained by this Court.

b) The primary effect of the Act is aid to freedom of choice.

The court below found that the primary effect of the legislation is aid to religion. This is not true. The primary

79. *See* Comments of Rabbi Weinberg at Second National Institute Planning Meeting, New York City, May 19, 1962. Published by National Conference of Christians and Jews, Project, Religious Freedom and Public Affairs, in pamphlet entitled *Religion and Education*, p. 43. (Emphasis supplied).

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effect is aid to persons in their efforts to secure education for their children. The aid, then, goes to persons, not to institutions; and that which is primarily aided is their personal freedom to choose the school for their child.[80]

Parents have the constitutionally protected right *(Pierce)* to choose education for their children other than the kind which is offered by state-hired teachers; they also have the right to choose the latter kind. That is, they have the right to choose public education or nonpublic education; they have the right freely to choose to entrust their children to public school teachers or to nonpublic school teachers.

Those parents who wish to choose public school teachers can send their children to public schools, where the entire tuition is subsidized with public funds. This is not new. What Act 92 does is to help to even the scales of justice by offering to those other parents, those who wish to choose nonpublic school teachers, a subsidy also. In this way, parents are enabled to make the choice—a constitutionally protected choice—between the two kinds of schools, the two kinds of teachers, the public and the nonpublic.

There is nothing wrong with this action of the state. It does not violate, but rather fulfills, the mandate of the Declaration to "secure these rights."

Plaintiffs, in their efforts to invalidate Act 92, were moved by motives not of liberty, but rather of religion. They seek to inject the question of religion into the picture by arguing that the reason, the motive, why many parents choose to send their children to nonpublic schools, is religion. Therefore, they say, the primary purpose of the *Act* is aid to religion. They are here confusing the purpose and

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80. The legislation indirectly aids religion in that the method selected for aid to education (tuition reimbursement) is designed to secure the parental freedom of choice, a freedom whose exercise is very often motivated by religious considerations. This indirect aid to religion, however, *is* indirect. It is not the *primary* effect. It is rather inevitably, the indirect effect which flows from the exercise of religious freedom.

motives of some (even most, perhaps) parents with the purpose and motive of the state. This is a fundamental error.

The motive of the state and the motives of parents are not the same thing. Under our Constitution, the State must be neutral with respect to religion; it must avoid making judgments or taking actions which favor one or another of the many conflicting and competing ideas concerning religion. But, parents are under no such restriction. Parents are not required to be neutral. Parents have the right and the high responsibility *(Pierce)* to make the judgments and to take the actions, which are forbidden to the State.

The State may, indeed must, encourage freedom. It may not, indeed it must not, seek to exercise that freedom for the person. The encouragement of freedom, for all, is a proper, an essential function of the State. The exercise of that freedom is reserved to the person.

i) The purpose of the state under Act 92.

The State in Act 92 seeks to encourage education generally, and to encourage freedom of choice in education by providing the parent with the means to exercise that freedom without the coercive effect of economic necessity. The State recognizes that the right to choose a particular kind of education should not be restricted to those with fat purses. As Mr. Justice Douglas said, in delivering the opinion of the Court in *Murdock v. Pennsylvania*, 319 U.S. 105, 111 (1942), "Freedom of speech, freedom of the press, freedom of religion are available to all, not merely to those who can pay their own way." Poor parents also have the right to choose the teachers of their children, a right which is of little practical value so long as the state, in the exercise of its power to tax and spend for education, taxes everyone but spends only for the benefit of those who choose to send their children to public school teachers. This is not freedom of choice. Act 92 is a recognition of this fact by the Commonwealth of Pennsylvania and a move in the direction of freedom.

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The Commonwealth advances freedom in a manner which, while safeguarding the freedom of all, avoids doing anything which might compromise that state neutrality, with respect to religion, which is but another aspect of freedom. Thus Act 92, by directing the funds to the parents, and not to the nonpublic institutions, subsidizes freedom which is to be exercised by the parents, and avoids making any judgment or taking any action with respect to religion which, in many cases, is an essential element in the institution. In this way, the Commonwealth has avoided that "excessive entanglement" which is forbidden by the Constitution, and which was the fatal error which this Court found in an earlier attempt by Pennsylvania to solve the problem of educational freedom. (See Act No. 109 of 1968) *Lemon v. Kurtzmann*, 403 U.S. 602 (1971). In the earlier Act, the state chose a method of action which subsidized the supply, rather than the demand; it directed its funds to the institution rather than to the parent; and it thereby became entangled in those excessive state controls over institutions which lead inevitably to the regulation, by the state, of religion. Consequently, the state violated, rather than preserved, liberty.

This question of method is all important.

The state's purpose in both Act 109 and Act 92 is the same, to encourage freedom of choice in education; but the methods selected are profoundly different. In Act No. 109, the method selected was aid to institutions with concomitant controls over the curriculum, particularly the religious aspects of that curriculum. The *effect* of their method was to destroy, rather than to encourage, freedom, and to violate that neutrality which is the only proper attitude of the state with respect to religion. It was a fatal error.

As this Court stated in *NAACP v. Alabama*, 377 U.S. 288, 307 (1964):

> "'. . . governmental purpose to control or prevent activities constitutionally subject to state regulation may not be achieved by means which sweep un-

necessarily broadly and thereby invade the area of protected freedoms.'"

Act 92, with its aid to parents rather than to institutions, and its scrupulous avoidance of any element of state control over those institutions, has thereby achieved the purpose of encouraging freedom of choice in education, while using a method which avoids the fatal error.

ii) The purpose of the parent.

As we have indicated, *supra*, the purpose of the state and the purpose of the parent must not be confused. It is the state, and not the parent, which is required, to be neutral. It is the state, and not the parent, which must close its eyes to religious judgments. The state must be scrupulous in maintaining its neutrality in matters of religion, it must not, however, seek to impose a similar neutrality upon persons, particularly parents.

Each parent has the right, in exercising his constitutionally protected freedom to choose the educators of his children, to make that choice in accordance with whatever criteria of value may seem appropriate to him. It is not the business of the state to judge these criteria. So long as the schools selected fulfill the minimum standards which are within the proper jurisdiction of the state to impose, the reasons which may or may not impel various parents to choose one school rather than another, are not the concern of the state. One parent might prefer school A for its discipline; another might choose school B because it emphasizes a liberal or even permissive approach. One might prefer a school's emphasis upon the classics; another might find a modern school more to his taste. And there is no doubt, that for many parents (the great majority, perhaps?), a very important criterion, possibly the most important of them all, is the attitude of the particular school with respect to the great questions which underlie all education: What is man? Whence does he come? Whither is he going? Why

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does he live? How should he live? What, if anything, is the purpose of existence? These are some of the great questions to which religion and philosophy seek to supply answers. For many parents, those answers, whether they be theistic or atheistic, or somewhere in between, are vitally important reasons for selecting or rejecting particular schools.

In any event, whatever be the approach of the school, or whatever criterion seems most compelling to the choosing parent, *the matter is not one with which the state may concern itself.*[81] In this field of value judgments, and preeminently in the field of religious values, no arm of the state may presume to decide which choice is valid, which invalid; which is better, which worse; which is true, which false.

Statesmen, those men and women to whom the powers of government have been entrusted, are human beings like the rest of us, and, being human, they have their own personal beliefs and convictions with respect to all of these value judgments. But in their role as statesmen, whether they are magistrates or solons or members of the judiciary, they are bound, by the law and by their oaths to uphold that law, to refrain from making their personal views the basis for their official actions. No matter how firmly they may believe, how deeply they may be convinced, that the choice of one (or many) parents is good or prudent, or that the choice of one (or many) is evil or unwise, they are bound to

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81. Cases such as *Almond v. Day*, 197 Va. 419, 89 S.E. 2d 851 (1955) and *Hartness v. Patterson*, 197 S.E. 2d 907 (S.Car. 1971), where the courts struck down attempts to maintain racial segregation through the subterfuge of directing tuition payments through the parents, are not apposite. There, the parents were participating in a conspiracy to work an injustice against their neighbors by perpetuating racial segregation. Here, the state assists the parent in the exercise of his constitutional right. There is no constitutional right to inflict racial segregation on your neighbor. In fact, Act 92 makes parents ineligible for aid if they select a school which discriminates on racial grounds. For the same reason, the cases cited by the court in *Wolman v. Essex*, 342 F. Supp. 399, 415-16 (S.D. Ohio E.D. 1972) are also inapplicable.

avoid any action by which they would be using their official positions and power to impose their personal views upon their fellow citizens.

The lower court, in permitting plaintiff to inject the issue of religion into this educational matter, has improperly adopted one particular view regarding the role of religion in education and by its decision has imposed that view upon the legislature and the people of Pennsylvania.

This decision ignores the fact that the Constitution makes no provision regulating the role of religion in education. It governs only the role of the state with respect to religion, not the role of religion with respect to other aspects of life. Thus, the judgment, whether or not the secular and the sectarian aspects of education can or should be separated, is not a proper question for this Court. For such a question is a theological one, and this Court, like all other arms of government, is disabled by our Constitution from answering such questions.

C. The court's decision creates an insoluble paradox.

One difficulty created by the excessive emphasis on nonestablishment and by the resulting tendency to impose the neutrality proper to government on nongovernmental persons or agencies, is the "insoluble parodox" noticed by Mr. Justice White in *Lemon*.

> "The Court thus creates an insoluble paradox for the State and the parochial schools. The State cannot finance secular instruction if it permits religion to be taught in the same classroom; but if it exacts a promise that religion not be so taught—a promise the school and its teachers are quite willing and on this record able to give—and enforces it, it is then entangled in the 'no entanglement' aspect of the Court's Establishment Clause jurisprudence."[82]

82. 403 U.S. at 668 (White, J., concurring in part and dissenting in part).

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The district court, in the instant case, ran afoul of this same paradox:

> "Second we conclude that the effect of the Act is to aid the schools and therefore the failure of the state to ensure that the funds are restricted to secular education or general welfare services renders the Act unconstitutional.[8] " [83]

The court's footnote 8 explains the problem:

> "If the Act did include restriction on the use of the funds, the Act would also have to avoid excessive government entanglement with religion in the administration of these restrictions. See *Lemon* and *Tilton*. The combination of the primary effect and entanglement tests clearly restricts the scope of permissible government aid to religious schools."

It is submitted that so long as the two tests are interpreted and applied according to a rigid view of establishment, the scope of government aid will be reduced to practically none at all. This "no aid" approach is perfectly consistent with the views of the proponents of an absolutist concept of separation of church and state; but it leaves much to be desired by those who believe in the importance of freedom and the wisdom of "benevolent neutrality."

Mr. Justice Stewart has referred, in *Sherbert*, to "the Court's duty to face up to the dilemma posed by the conflict between" the two clauses "as interpreted by the Court." [84] So long as the Court fails to face this dilemma,

> ". . . so long will the possibility of consistent and perceptive decision in this most difficult and delicate area of constitutional law be impeded and impaired. And so long, I fear, will the guarantee of true religious freedom in our pluralistic society be uncertain and insecure." [85]

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83. 340 F. Supp. at 1364.
84. 374 U.S. at 416 (Stewart, J., concurring).
85. *Id.*, at 417.

Similarly, Circuit Judge Oakes has expressed the concern that the twin "tests" of excessive entanglement and impermissive involvement "may signify the ultimate demise of the parochial school in America." [86]

All of these seeming dilemmas and apparent paradoxes can be resolved, and the apparent antagonism between the two Religion Clauses reconciled, so that they will work in harmony as was intended, if all concerned will withdraw from a rigid, absolutist, emphasis upon nonestablishment, and recognize the common ideal to be the encouragement of religious freedom of educational choice. Then, government will take whatever steps seem reasonably required to support freedom without preference or favor as between the various kinds of belief and disbelief and without unnecessary and unwelcome attempts by government to regulate or control the religious content or non-content of the education freely selected by the persons.

The plan provided by Pennsylvania's Act 92 seems to fit this formula: it recognizes that some aid is reasonably necessary if hard pressed parents are to be able to exercise their freedom in education; it provides that aid in amounts less than the total cost of the education, thus leaving room for that voluntary effort which is so important to freedom; it forbids any intervention by the state to regulate the schools, deeming the religious content to be a matter which properly belongs between the parent and the school; it makes the aid available to all parents who have chosen or may, in the future, choose any accredited nonpublic school, without discrimination between sectarian and nonsectarian choices, or among the various religious or anti-religious views which may enjoy the favor of the persons. Thus, Act 92 satisfies the demands of both the Establishment Clause and the Free Exercise Clause and preserves the government's neutrality while respecting the freedom of the person.

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86. Americans United for Separation of Church and State v. Oakey, 339 F. Supp. 545, 553 (D. Vt. 1972) (Oakes, Cir. J., concurring). *See* discussion p. 67, *infra*.

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D. Political entanglement—a dangerous departure.

Although the district court, which based its decision upon the primary effect test, found no excessive entanglement between government and religious institutions, nevertheless, for the reasons set forth below, your *amicus* believes it important to discuss the matter of entanglement in this brief.

The profound concern, felt by lawmakers and other citizens, for the survival of pluralism in education, and of the freedom of educational choice inherent therein, has been transformed into a state of alarm as a result of the recent decision of this Court affirming, without oral argument or the filing of briefs, and without opinion, the decision by a three-judge federal court in *Wolman v. Essex*.[87] Although there are a number of distinctions between the statute in *Essex* and our Act 92, the lower court's views in that case[88] reflect a disturbing retreat from the policy of "benevolent neutrality" established by prior well reasoned opinions of this Court,[89] and a definite acceptance of the exaggerated theory of "separation-of-church-and-state," in the absolute sense, which has never been adopted, but often specifically repudiated by this Court.[90] The essence of the *Essex* opinion, and of the opinion of the lower court in the instant case, is a strong tendency to emphasize the Establishment Clause at the expense of the Free Exercise Clause, thus substituting hostility for the required neutrality. If this hostile interpretation of the First Amendment is allowed to stand, the effect upon religious liberty and upon the concept of pluralism in American education will be disastrous.

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87. 342 F. Supp. 399 (S.D. Ohio E.D.), *aff'd.* — U.S. —, 34 L. Ed. 2nd 69 (1972).

88. *Id.*

89. *See* Walz v. Tax Commission, 397 U.S. 664, 669 (1970), and cases cited; Everson v. Board of Education, 330 U.S. 1, 18 (1947).

90. *See* Walz, *supra*, 397 U.S. 644, Zorach v. Clauson, 343 U.S. 306 (1952).

Despite the well recognized importance of pluralism and diversity to our free society, and, although this Court has never formally adopted the hard line of hostility in church-state relations, its action in affirming the decision of the lower court in *Essex* has confounded local and state lawmakers and given rise to deep concern respecting the line between prohibited and permitted forms of public aid for the education of children in schools of the parents' choice.

The cause of this concern is to be found in the *Essex* court's heavy reliance upon a certain passage which appears as Section "IV" in the principal opinion in *Lemon v. Kurtzman*.[91] In that section of the opinion, which counsel for appellant and your *amicus* deem to be *obiter dicta*, the Court speaks of "a broader base of entanglement of yet a different character [which] is presented by the divisive political potential of these state programs".[92]

Chief Justice Burger stated that he deplored the probable intensification of political divisiveness along religious lines resulting from the annual appropriations required under the statute, benefiting relatively few religious groups. The opinion, however, does not expressly declare that this "divisive political potential" constitutes, as a matter of law, a new and separate test[93] of whether or not a legislative plan meets the requirements of the Establishment Clause. It certainly was unnecessary to the decision in *Lemon*, since the excessive entanglement created by the system of state controls with respect to the teaching of "secular subjects" was sufficient to vitiate the statutes. However, the heavy reliance on this concept by the district court in *Essex*, referred to there as "political entanglement", would appear to elevate this theory to the status of a rule of law. Thus, the

91. 403 U.S. at 622-24.

92. *Id.*, at 622.

93. *Id.* This political entanglement test would be in addition to the administrative entanglement which results when government assumes to regulate and control the affairs of religious institutions in an excessive manner.

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Essex court found this doctrine to be "a distinct aspect" (as distinguished from "administrative entanglement") of the excessive entanglement test.

> "In addition, a second and distinct view of the entanglement doctrine involves 'political entanglement' and requires an inquiry into the level and nature of political activity such aid may engender and an analysis of the possible consequences of such political activity fractionalizing the electorate along religious lines." [94]

A brief word might be said concerning the fact that a limited class of persons is benefitted by the program. Although the *Essex* court recognized that the small size of the statutory class was not a basis for a finding of unconstitutionality *per se*,[95] it placed considerable emphasis upon the aspect, suggesting that small classes called for stricter scrutiny in the search for excessive entanglement.[96] There is some support for this concept in *Lemon*, where *Walz* was distinguished on this basis.[97] The short answer to this problem is that "small" and "large" are relative terms. Although only 12% of Ohio's children were eligible for tuition benefits, this was not a small group, but, in fact, the largest possible group, since it encompassed *all* of those who could possibly be assisted (the remaining 88% being subsidized completely in the public schools). Similarly, in Pennsylvania the statute covers *all* persons who choose, or may in the future choose, nonpublic schools. Although in each case the great majority of eligibles (about 90%) have, in fact, chosen one kind of school (Roman Catholic), this is their constitutional right. Surely, the constitutional test cannot be founded upon how large or small a group may be, which opts for one religion, where the right to opt is made available to all. The size of the group is immaterial to the

94. 342 F. Supp. at 413.
95. *Id.*
96. *Id.*
97. 403 U.S. at 623.

constitutional question. Whether, as in Philadelphia and other urban centers, the number of beneficiaries is large (Philadelphia, over 35%) or, as in many rural areas, there may be few if any beneficiaries, the principle is the same. As Mr. Justice Stewart said:

> "And I think that the guarantee of religious liberty embodied in the Free Exercise Clause affirmatively requires government to create an atmosphere of hospitality and accommodation to individual belief or disbelief. In short, I think our Constitution commands the positive protection by government of religious freedom—not only for a minority, however small—not only for the majority, however large—but for each of us." [98]

Due to the action of the *Essex* court, and its affirmance by this Court (although without a hearing or an opinion), and in view of the resulting serious implications with respect to the future of educational freedom in America, we believe it necessary to point out what appear to be the dire consequences of such a policy.

1) Divisiveness and pluralism distinguished.

It is extremely important, in any discussion of these matters, to distinguish between divisiveness and pluralism. Divisiveness is that state of hostility and conflict which arises, in the presence of differing beliefs, as a result of the unwillingness of some men to tolerate the coexistence, on the basis of equal rights, of other beliefs. Pluralism, on the other hand, is the condition which results when men of differing beliefs agree to live together in peace, on the basis of mutual respect and equal rights. Divisiveness seeks to have one view dominate while repressing those who differ; pluralism seeks to permit many views to exist, side by side, with none established as official, and all free to compete for

98. 374 U.S. at 415-16, (Stewart, J., concurring).

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the minds of men. Divisiveness is incompatible with the American constitutional principle; pluralism is an essential corollary of that principle.

2) *The channels of debate must be kept open.*

It is fundamental that pluralism cannot survive in the absence of freedom of expression. The channels of debate must be kept open or else freedom dies. Freedom of speech, of the press, of the right of peaceable assembly, of the right to petition the legislature for a redress of grievances—these, with freedom of religion, make up that galaxy of bedrock rights which have been enshrined in the First Amendment. These are the quintessence of the American Way.

How startlingly and alarmingly inconsistent it is to read in an opinion of our highest Court, and on the authority of one of our foremost professors of law, that, although political debate and division are "normal and healthy manifestations of our democratic system,"[99] religious freedom is an exception!!

The professor, in his article[100] cited by the Court,[101] poses a most extraordinary and shocking solution to a vexing problem in "this most difficult and delicate area of constitutional law" [102]—he proposes to eliminate the debate!

> "Ordinarily, I am disposed, in gray-area[103] cases of constitutional law, to let the political process function . . . The religious guarantees, however, are of a different order. While political debate and division is normally a wholesome process for reaching viable accommodations, political division on religious lines

99. 403 U.S. at 622.

100. *See Freund, supra* note 73, at 1691-92.

101. 403 U.S. at 622.

102. *See* 374 U.S. at 417 (Stewart, J., concurring).

103. *See* Mr. Chief Justice Burger's remark that "the language of the Religion Clauses . . . is at best opaque . . .", 403 U.S. at 612.

is one of the principal evils that the first amendment sought to forestall . . . as between open-ended, ongoing political warfare, and such binding quality as judicial decisions possess, I would choose the latter in the field of God and Caesar and the public treasury." [104]

In this ringing peroration, the professor proposes not only to deny the proponents of public aid for parents' rights in education any access to the normally wholesome forum of political debate—he would seek to use the power of the courts of justice to achieve his purpose; and all of this upon no more authority, in law or in history, than his own *ipse dixit* to the effect that the First Amendment was intended for this very purpose!

Let those who would achieve unity at the price of freedom, attend to these words of this Court:

> "Struggles to coerce uniformity of sentiment in support of some end thought essential to their time and country have been waged by many good as well as by evil men. Nationalism is a relatively recent phenomenon but at other times and places the ends have been racial or territorial security, support of a dynasty or regime, and particular plans for saving souls. As first and moderate methods to attain unity have failed, those bent on its accomplishment must resort to an ever increasing severity.
> *As governmental pressure toward unity becomes greater, so strife becomes more bitter as to whose unity it shall be.* Probably *no deeper division of our people could proceed from any provocation than from finding it necessary to choose what doctrine and whose program public educational officials shall compel youth to unite in embracing.* Ultimate futility of such attempts to compel coherence is the lesson of every such effort from the Roman drive to stamp out Christianity

104. *Freund, supra* note 73 at 1692.

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as a disturber of its pagan unity, the Inquisition, as a means to religious and dynastic unity, the Siberian exiles as a means to Russian unity, down to the fast failing efforts of our present totalitarian enemies. *Those who begin coercive elimination of dissent soon find themselves exterminating dissenters. Compulsory unification of opinion achieves only the unanimity of the graveyard.*

It seems trite but necessary to say that the First Amendment to our Constitution was designed to avoid these ends by avoiding these beginnings. There is no mysticism in the American concept of the State or of the nature or origin of its authority. *We set up government by consent of the governed, and the Bill of Rights denies those in power any legal opportunity to coerce that consent. Authority here is to be controlled by public opinion, not public opinion by authority.*" [105]

The tragedy of the doctrine of judicial suppression of fundamental rights is that it is inherently evil as contrary to the very essence of democracy and of human freedom; but the tragedy is compounded by the futility of efforts to seek peace through coercion.

The assumption, that a free people, or a substantial portion of them, when faced with the suppression of deeply felt rights by judicial fiat or by any other exercise of governmental power, will meekly subside into quiet acquiescence, misreads the temper of parents in a democratic society intent upon the defense, at whatever cost, of their sacred right to select the teachers to whom they will entrust an important part of the education of their children. Denied effective recourse to the courts of justice, parents will transfer their efforts to other forums, and the battle will continue to rage, its bitter effects worsened, however, by the absence of the ameliorating effects of courts of law. Confronted with the twin thrusts of spiraling costs and the denial of a fair

105. West Virginia State Bd. of Education v. Barnette, 319 U.S. 624, 640-41 (1942) (emphasis added).

share of tax funds, and forced thereby to abandon separate schools,[106] parents will transfer their struggle to the new arena, the monolithic public school, into which they will have been thus compelled to enroll their children. The school itself will become the new battleground, as each warring group, intent upon defending its own children from the imposition of alien theological, philosophical or other profound concepts of moral and spiritual value, seeks to persuade or coerce the school authorities to adopt educational policies and to select teachers whose fundamental values are consistent with each group's own deeply held values. The struggle for dominance, within the public schools, of one or another set of values, will continue to rage, with immense damage to the children and to the entire society, until one view shall have succeeded in suppressing all the others and in establishing itself as the one official set of values which shall be imposed upon all. This is neither freedom nor justice. It is rather the negation of those principles which motivated the founders of our country and moved them to adopt our Constitution, and especially, our Bill of Rights. The victor in such a struggle will become the established religion and the free exercise of religion will have ceased to be a significant element in the lives of our people.

The attempt to suppress differences by governmental *fiat* (whether by judicial or legislative action, or by the administrative action of the authorities who regulate the common schools), is guaranteed, among a people who still maintain the appetite for freedom, to produce the bitter

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106. President Richard M. Nixon, on March 3, 1970, declared:

"Up to now, we have failed to consider the consequences of declining enrollments in private elementary and secondary schools, most of them church supported, which educate 11% of all pupils-close to six million school children. *In the past two years, close to a thousand nonpublic elementary and secondary schools closed and most of their displaced students enrolled in local public schools.*" (emphasis supplied).

See note 12 *supra*.

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conflict and hostility which the Founding Fathers strove to prevent.

3) *New "test" imperils nonpublic schools.*

The danger inherent in the new "test" was recognized by Circuit Judge Oakes, in *Americans United for the Separation of Church and State v. Oakey*, who saw, in the combination of "excessive entanglement" and what he called "impermissible involvement", the possibility of the "ultimate demise of the parochial school in America." Judge Oakes stated:

> "To me, this would be a most unfortunate result. Ours has been a pluralistic society, fostering creativity out of multiple peoples, religious and philosophical systems of thought, and ethnic ties. Cf. R. Niebuhr, a note on Pluralism, in Religion in America 42 (1950). In the advancement of this pluralistic society the parochial school system has played a not insignificant part. *Lemon*, I fear, will tend toward a homogenization of American education. There will, therefore, be all the more reason to search for ways within the American system of public education that will preserve, indeed promote, the diversity of individual belief—religious, political and social—that, along with our Bill of Rights, distinguishes us so plainly from certain uniform, unified and uni-governed societies elsewhere in the world."[107]

4. *The intention of the Court?*

Your *amicus* is convinced that this Court never intended the inevitable result which would occur if the concept of political divisiveness or political entanglement were to become the law. We are confident that this unfortunate expression of judicial policy was, in fact, one of those "too

107. 339 F. Supp. 545, 553 (D.Vt. 1972).

sweeping utterances" which were referred to by Mr. Chief Justice Burger in *Walz:*

> "In attempting to articulare the scope of the two Religion Clauses, the Court's opinions reflect the limitations inherent in formulating general principles on a case-by-case basis. The considerable internal inconsistency in the opinions of the Court derives from what, in retrospect, may have been too sweeping utterances on aspects of these clauses that seemed clear in relation to the particular cases but have limited meaning as general principles.
>
> "The Court has struggled to find a neutral course between the two Religion Clauses, both of which are cast in absolute terms, and either of which if expanded to a logical extreme, would tend to clash with the other."[108]

It is submitted that *Lemon* need not produce such evil results, for this Court has a new opportunity in this, the second *Lemon* case, to withdraw from the edge of the precipice, to prevent the development of a "downhill thrust"[109] in the direction of an "homogenization of American education."

We believe that the American system of public education is big enough and strong enough to preserve, indeed promote, the education of all children, in both public and nonpublic schools. As was said by several of the Justices in *Yoder:*

> "In this present case, the State is not concerned with the maintenance of an educational system *as an end in itself,* it is rather attempting to nurture and develop the human potential of its children, whether Amish or non-Amish: to expand their knowledge,

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108. 397 U.S. at 668.

109. *Cf.* 403 U.S. at 624, where the thrust seemed to be moving in another direction.

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broaden their sensibilities, kindle their imagination, foster a spirit of free inquiry, and increase their human understanding and tolerance." [110]

So too, the Commonwealth of Pennsylvania, in Act 92, is not concerned with schools *per se;* it is rather attempting to nurture the educational opportunities of all of its children regardless of the schools they may attend. The schools are but means; the end is education. The preservation of a variety of schools is but a means; the end is the preservation of freedom. Where there is no choice, there is no freedom.

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110. — U.S. —, 32 L. Ed. 2d 15, 38 (1972) (White, J., concurring, Brennan and Stewart, J.J., joining) (Emphasis added).

SUMMARY

Pennsylvania's Parent Reimbursement Statute (Act No. 92 of 1971) is a statute carefully designed to secure the right of parents to choose the teachers of their children, in a fashion which avoids excessive entanglement between church and state; all in accord with the language of the United States Supreme Court as expressed in various decisions in which this Court has endeavored to balance the two constitutional principles of free exercise of religion and no establishment of religion; most recently in *Lemon v. Kurtzman, supra.*

In spite of all of this, in spite of the clear language of this Court, and despite the immense economic importance to the education of all of the children in Philadelphia and other great cities and other heavily populated areas, where heavy transfers, forced or otherwise, of students from nonpublic to public schools will create massive disruptions and insurmountable financial problems for already overburdened taxpayers struggling to solve the present problems of public education and the mounting problems posed by rising crime and deteriorating housing and other urban problems—despite all of this, the lower court has ignored the plain intention of the legislature and the equally plain language of this Court and, by the simple process of exaggerating the concept of church-state separation, at the expense of religious freedom, has struck down this very carefully drawn legislation.

The Commonwealth of Pennsylvania is aware of the growing burden of inflation and rising taxes, which burden has endangered the constitutionally protected right of parents to choose the kind of education they wish for their children by making it ever more difficult for such parents to meet the costs of such education. As a result many of the nonpublic schools, which provide the alternate choices without which freedom to choose would be meaningless, are closing, thereby compounding the evil. As a further result, many children formerly educated in nonpublic schools

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are pouring into the hard pressed public schools, adding to the difficulties there, and reducing educational opportunities for all of the children of the Commonwealth.

In order to assist parents to carry their burden, and thereby improve educational opportunities for all, Pennsylvania adopted a statute providing tuition reimbursements for parents whose children attended nonpublic schools. These payments, which are substantially less than the actual cost of education in such schools, are paid directly to the parent; no money is paid to the school; and the State Authority is not permitted to regulate or control the schools. In this way the parent's free exercise of religion is protected while the state avoids setting up such excessive governmental entanglements with the religious schools as would offend the constitutional ban on Establishment of Religion.

The district court however, by overemphasizing the Establishment Clause and undervaluing the Free Exercise Clause, has seen only the school and its religion while overlooking the parent and his religious freedom. The court, contrary to previous decisions of this Court, has ignored the significant difference between aid to persons and aid to schools, and therefore ignored the parent's status as the real party in interest, calling him a mere conduit to carry money from the state to the religious school. Further the court has held, without authority of law, that even if the parent is the real party in interest, the state has no power to help him to secure a religious education for his children.

The court has been led into these errors by a series of false assumptions:

—that the parent is a mere conduit for funds, whereas, he is the real party in interest.

—that public schools are neutral and therefore the choice of a nonpublic school is merely the choice of the same plus religion; whereas, in fact, the public school is not neutral, but, founded upon a secularist philosophy, it is hostile to the religious sensibilities of many of our citizens.

—that the activity aided by the statutory program is religion; whereas, the activity aided by the state is the free choice of education.

—that because government must be neutral with respect to religion, all activities of government-aided persons or institutions must be neutral; whereas, persons, whether parents or teachers, cannot and should not be neutral, but are entitled to freedom to choose with respect to education and religion and are also entitled to the encouragement, and not the hostility, of the state in these matters.

Act 92 avoids the three main evils against which the Establishment Clause was directed: sponsorship, financial support and the active involvement of the sovereign in religious activity. It meets all of the tests of constitutionality: secular legislative purpose, a primary effect that neither advances nor inhibits religion, and the avoidance of governmental entanglement with religion.

Although the district court did not find entanglement here, it is imperative that this Court shall not apply an alleged fourth test, the danger of political entanglement, to this case. Such a doctrine, founded upon the theory that matters which are likely to stir religious controversy must be denied a voice in the legislative forum, lest the controversy create bitterness and divisiveness, is contrary to the most basic principles of our democracy. It would silence those citizens who would petition for a redress of grievances, whenever, in the opinion of a court, their request might be expected to be met with opposition.

The better view, one more consistent with American ideals of freedom and pluralism, is to encourage freedom by encouraging diversity, and to do so by assisting the parent to exercise his freedom rather than by risking excessive governmental entanglement by direct assistance to schools.

If the action of the district court is not reversed many parents, particularly the poor, will be deprived of their

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right to choose the educators of their children, the public schools will be compelled to receive large numbers of additional and unwilling students to the great financial loss to all the taxpayers, and the great psychological loss to the entire community.

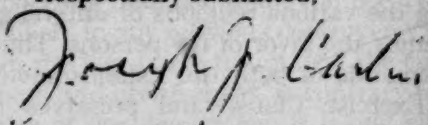
Differences, in the presence of mutual respect, produce peaceful coexistence. Differences, in the presence of efforts to suppress or coerce, produce bitterness and an end to the public peace.

The Pennsylvania Parent Reimbursement Act meets all of the lawful tests laid down by this Court. It recognizes that some aid is reasonably necessary if hard pressed parents are to be able to exercise their freedom in education; it provides that aid in amounts less than the total cost of the education, thus leaving room for that voluntary effort which is so important to freedom; it forbids any intervention by the state to regulate the schools, deeming the religious content to be a matter which properly belongs between the parent and the school; it makes the aid available to all parents who have chosen or may, in the future, choose any accredited nonpublic school, without discrimination between sectarian and nonsectarian choices, or among the various religious or anti-religious views which may enjoy the favor of the persons. Thus, Act 92 satisfies the demands of both the Establishment Clause and the Free Exercise Clause and preserves the government's neutrality while respecting the freedom of the person.

CONCLUSION

Your *amicus*, the City of Philadelphia, conscious of its heritage as the birthplace of liberty in America; aware of the profound value which its citizens place upon the right of religious freedom, and particularly freedom in education; confident, as a matter of principle and by reason of its experience, that schools of different kinds, public and non-public, sectarian and nonsectarian, can and will coexist in an atmosphere of mutual respect and harmony, so long as no attempt is made by either to destroy the others; realizing that the immense impact of inflation, of spiralling costs, and of burgeoning taxes, threatens to destroy the ability of parents, and especially poor parents, to exercise their sacred rights; and believing Act 92 of the Commonwealth of Pennsylvania is a statute well designed to protect the rights of all of its people and the educational opportunities of all of its children, without the use of means which would endanger religious freedom or create an excessive entanglement of governmental and religious institutions; respectfully and urgently moves this Honorable Court to reverse the decision of the district court and preserve this excellent statute.

Respectfully submitted,



JAMES L. J. PIÉ
Deputy City Solicitor
JOSEPH J. CARLIN
Deputy City Solicitor
THOMAS B. EREKSON
Law Department
MARTIN WEINBERG
City Solicitor
Attorneys for Amicus Curiae

1520 Municipal Services Bldg.
Philadelphia, Pa. 19107

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